Supreme Court, U. S.
FILED
JUL 26 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974.

No. 74-18

SOLOMON FISHER, MORRIS GOLDSMITH and SALLY GOLDSMITH,

Petitioners,

v.

UNITED STATES OF AMERICA and ALAN M. FELDMAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

WILLIAM T. COLEMAN, JR.,
RICHARD L. BAZELON,
2600 The Fidelity Building,
Philadelphia, Pa. 19109
Attorneys for Petitioners, Solomon Fisher, Morris Goldsmith and Sally Goldsmith.

Of Counsel:
DILWORTH, PAXSON, KALISH, LEVY & COLEMAN,
2600 The Fidelity Building,
Philadelphia, Pa. 19109

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

INDEX TO BRIEF.

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	6
I. The Holding of the Court of Appeals That Any Fifth Amendment Protection for Taxpayers From Compelled Production of Documents Is Negated by Transfer of These Documents From the Taxpayers' Personal Possession to the Possession of Their Counsel for Use in Representing Them in a Criminal Investigation Raises Important Questions Under the Fifth and Sixth Amendments to the United States Constitution	6
II. If the Locus of the Documents in the Hands of a Lawyer Does Not Alter the Scope of the Fifth Amendment Rights of His Clients, Then This Case Raises an Additional Important Issue of the Scope of an Individual's Fifth Amendment Right to Protection From Being Compelled to Produce Documents Concerning His Personal Affairs Which Are in His Permanent and Rightful Possession	8
III. There Is a Conflict Among the Courts of Appeals on Both of the Important Questions Which Are Raised by This Case	9
IV. The Court of Appeals Erred in Ordering Taxpayers' Attorney to Comply With the IRS Summons	10

INDEX TO BRIEF (Continued).

	Page
A. The Third Circuit Erred in Holding That the Transfer of Records by the Taxpayers to Their Attorney Precluded Fifth Amendment Protection for the Taxpayers From Compelled Production of Those Records	10
B. If the Records in This Case Were in the Constructive Possession of the Taxpayers at the Time the Summons Was Served, the Taxpayer Is Protected From Compulsory Production of the Records	14
V. The Basic Problem Presented by This Case Is Recurring and of Great Importance	15
CONCLUSION	16
APPENDIX A—District Court Opinion	A1
APPENDIX B—Court of Appeals Opinion	A8
APPENDIX C—Internal Revenue Code of 1954, Section 7602	A45

TABLE OF CASES CITED.

	Page
Boyd v. United States, 116 U. S. 616	14
Brody v. United States, 243 F. 2d 378 (1st Cir. 1957)	13
Colton v. United States, 306 F. 2d 633 (2nd Cir. 1962)	9, 13
Couch v. United States, 409 U. S. 322	7, 8, 13, 14, 15
Curcio v. United States, 135 U. S. 118	15
Donaldson v. United States, 400 U. S. 517	10
Escobedo v. Illinois, 378 U. S. 478	10
Miami Herald Publishing Co. v. Tornillo, 42 U. S. L. Week 5098 (1974)	11
Murdock v. Pennsylvania, 319 U. S. 103	11
Shelton v. Tucker, 364 U. S. 479	11
Speiser v. Randall, 357 U. S. 513	11
Spevack v. Klein, 385 U. S. 511	11
Talley v. California, 362 U. S. 60	11
United States v. Cohen, 388 F. 2d 464 (9th Cir. 1967)	8, 10, 15
United States v. Judson, 322 F. 2d 460 (1963)	9, 12
United States v. White, 322 U. S. 694	8
United States v. White, 487 F. 2d 1335 (1973), petition for a writ of certiorari pending, Oct. Term, 1974, No. 73-1308	7
United States v. Widelski, 452 F. 2d 1, cert. denied 406 U. S. 918 (1971)	10
Wilson v. United States, 221 U. S. 361	14

MISCELLANEOUS.

	Page
ABA Code of Professional Responsibility, Ethical Consideration 4-4	13
IRS News Release IR-949, Nov. 26, 1968; 1968 C. C. H. Stand. Fed. Tax Rep. ¶ 6946	10, 12
26 U. S. C.:	
Section 7602	3
Section 7402(b)	4, 9
Section 7604(a)	4, 9
28 U. S. C.:	
Section 1254(1)	2
U. S. Constitution:	
Fifth Amendment	3, 6, 7, 8, 9, 10, 11, 12, 14, 15
Sixth Amendment	6, 7, 12
8 Wigmore, Evidence (McNaughton Rev. 1961), § 2307	13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No.

SOLOMON FISHER, MORRIS GOLDSMITH AND SALLY GOLDSMITH,

Petitioners,

v.

UNITED STATES OF AMERICA AND ALAN M. FELDMAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioners Solomon Fisher, Morris Goldsmith and Sally Goldsmith pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on June 7, 1974, which affirmed an order of the United States District Court for the Eastern District of Pennsylvania.

OPINIONS BELOW.

The Opinion and Order of the United States District Court for the Eastern District of Pennsylvania is reported at 352 F. Supp. 731 (1972) and is printed as Appendix A

hereto, *infra* pages A1 to A7. An appeal from that order was argued before a panel of the United States Court of Appeals for the Third Circuit which issued no opinion, and was re-argued before that Court *en banc,* which issued the Opinion that is the subject of this Petition. That Opinion is not yet reported and is printed as Appendix B hereto, *infra* pages A8 to A44. One judge of the Court of Appeals filed a concurring Opinion, and one judge filed an Opinion dissenting in part. These Opinions are printed as part of Appendix B hereto, at pages A24 and A28 respectively.

JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit was entered on June 7, 1974. This Petition for a Writ of Ceritorari has been filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED.

An accountant who handled bookkeeping for petitioner-taxpayers made each year a written summary of petitioner-taxpayers' checks and deposits. On or about August 5, 1971, the accountant gave petitioner-taxpayers these summaries for the years 1969 and 1970. On August 17, 1971, petitioner-taxpayers turned these same summaries over to their counsel, petitioner-lawyer, so that he could represent them in connection with a tax investigation by the Intelligence Division of the Internal Revenue Service. On December 1, 1971, a special agent of that Division served a summons on petitioner-lawyer requiring him to produce these documents. Petitioner-lawyer refused on the ground that

such a production would violate the Fifth Amendment rights of his clients. This refusal was reviewed by the courts below without a preliminary determination as to whether petitioner-taxpayers could successfully have asserted a Fifth Amendment right had they not turned the papers over to the lawyer. Therefore, the questions presented are:

1. Does the Fifth Amendment protect a person from compelled production of documents in his lawful and permanent possession, consisting of summaries of his cancelled checks and deposit receipts compiled by his accountant?

2. If the answer to the above question is affirmative, is the Fifth Amendment right lost by the person's placing these documents in the custody of his counsel for use in representing the person?

3. In any event, did the Third Circuit err in its disposition of these questions by failing to determine first whether the person would have had Fifth Amendment protection had he continued in possession of the documents?

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED.

This proceeding was brought by the United States to enforce an Internal Revenue Service summons issued under the authority of Section 7602 of the Internal Revenue Code of 1954, which is printed as Appendix C hereto, *infra* page A45. The Fifth and Sixth Amendments to the United States Constitution are also involved.

STATEMENT OF THE CASE.

The basic issue here is whether there would be a violation of the Fifth Amendment rights of petitioner-taxpayers if their counsel is forced by summons to surrender to the Internal Revenue Service documents which petitioner-taxpayers have placed in counsel's custody to aid him in representing them in a criminal investigation. In the courts below the Government has obtained an order enforcing an IRS summons directing petitioner-lawyer to produce documents turned over to him by his clients, petitioner-taxpayers, concerning their personal financial affairs. The summons was issued pursuant to an investigation of the petitioner-taxpayers conducted exclusively by the Intelligence Division of the IRS (N. T. 11, 22, 24). The Government brought this action to enforce the summons pursuant to 26 U. S. C. §§ 7402(b) and 7604(a) (1964). The District Court permitted taxpayers to intervene and held an evidentiary hearing.

The documents identified in paragraphs 1 and 3 of the summons as "Analysis of Receipts and Disbursements" are simply summaries of cancelled checks and deposits for the years 1969 and 1970 (Government's Ex. 2, N. T. 19, 61-62).[1] The summary for each of these years was prepared by petitioner-taxpayers' accountant. The accountant had been performing this function for the taxpayers for approximately twenty-five years, and regularly and consistently turned these summaries over to petitioner-taxpayers for their permanent possession after a period of three or four years from the time of preparation (N. T. 46, 51, 54, 55). The accountant regarded these records as belonging to petitioner-taxpayers (N. T. 52, 54), an understanding shared by petitioner-taxpayers (N. T. 65-66).

1. The Government does not seek enforcement with respect to paragraph 2.

In July, 1971, petitioner-taxpayers learned that they were under investigation by an agent of the Intelligence Division of the IRS and they requested their accountant to turn over to them the summaries for 1969 and 1970 (N. T. 19-20, 46-47). The summaries for earlier years had already been turned over to petitioner-taxpayers (N. T. 53). The accountant testified that the summaries for 1969 and 1970 were given to petitioner-taxpayers on August 4 or 5, 1971 (N. T. 51). On August 17, 1971, these papers were turned over by petitioner-taxpayers to their counsel for his use in furnishing legal advice and otherwise representing them (N. T. 3-4). They continued in petitioner-lawyer's possession on December 1, 1971, when the summons in question was served upon him by an agent of the Intelligence Division of the IRS. The summons was served by the special agent on the very day that he had learned that the lawyer intended to return the records to his clients (N. T. 18). Petitioner-lawyer appeared as directed in the summons, but refused to permit inspection of the documents on the ground that a Fifth Amendment right existed in his clients.

REASONS FOR GRANTING THE WRIT.

I. The Holding of the Court of Appeals That Any Fifth Amendment Protection for Taxpayers From Compelled Production of Documents Is Negated by Transfer of These Documents From the Taxpayers' Personal Possession to the Possession of Their Counsel for Use in Representing Them in a Criminal Investigation Raises Important Questions Under the Fifth and Sixth Amendments to the United States Constitution.

In the present case the Government seeks to compel production of papers from an attorney, when those papers concern the personal affairs of the attorney's clients, and were given to the attorney by his clients for his use in representing them with respect to a criminal investigation. The Court of Appeals, without first passing upon whether taxpayers would have the Fifth Amendment right if they still held the papers, held that petitioner-taxpayers no longer had Fifth Amendment rights with respect to the papers because they personally had not possessed them for a long enough period of time before delivering them to their attorney. The record shows, however, actual personal possession by the clients for approximately two weeks, followed by possession by the attorney for the sole purpose of legal representation and advice, for a period of approximately three and one half months prior to issuance of the summons whose enforcement is sought. Since the Government conceded that petitioner-taxpayers could have asserted a privilege had they retained the papers, the Court of Appeals wrongly distinguishes for Fifth Amendment purposes between an individual who retains papers himself and an individual who transfers those same papers to his attorney to obtain legal advice and repre-

sentation. This holding places a heavy penalty on the exercise of the Sixth Amendment right to counsel, and raises the basic question of whether an attorney's possession of records given to him by his client pursuant to an an attorney-client relationship solely for legal representation and advice should be distinguished from possession by his client for purposes of the Fifth Amendment.

In *Couch v. United States,* 409 U. S. 322, this Court emphasized that "actual possession of documents bears the most significant relationship to Fifth Amendment protections against governmental compulsions," and held that possession by an accountant did not constitute constructive possession by the taxpayer. In reaching this conclusion, the Court noted that there was no confidential accountant-client privilege, and no reasonable expectation of privacy in transfering records to an accountant. Since this Court's decision in *Couch* the Third Circuit (in this case) and the Fifth Circuit in *United States v. White,* 487 F. 2d 1335 (1973), petition for a writ of certiorari pending, Oct. Term, 1974, No. 73-1308, have decided cases involving possession by the taxpayers' attorney. In both instances the courts have recognized the importance and unsettled status of the Fifth Amendment issue by hearing and deciding the cases *en banc,* and in both cases strong dissents were entered. Thus this Court has before it the important issue of whether there is any difference in status and legal consequence between possession of a client's personal papers by an attorney for purposes of legal representation and possession by the client's accountant.

II. If the Locus of the Documents in the Hands of a Lawyer Does Not Alter the Scope of the Fifth Amendment Rights of His Clients, Then This Case Raises an Additional Important Issue of the Scope of an Individual's Fifth Amendment Right to Protection From Being Compelled to Produce Documents Concerning His Personal Affairs Which Are in His Permanent and Rightful Possession.

In *United States v. White,* 322 U. S. 694, this Court stated that "the papers and effects which the privilege protects must be the private property of the person claiming the privilege, or at least in his possession in a purely personal capacity," 322 U. S. at 699. In *Couch v. United States, supra,* this Court reiterated this statement, with emphasis on the final clause, 409 U. S. at 330, n. 1. However, neither *White* nor *Couch,* nor any other decision of this Court, has fleshed out the scope of that "personal possession" which would invoke Fifth Amendment privilege for the possessor of documents. This Court in *Couch* did cite with approval the Ninth Circuit decision in *United States v. Cohen,* 388 F. 2d 464 (1967), which upheld the Fifth Amendment privilege of a taxpayer whose documents and receipt of them from his accountant were virtually identical to the situation in the present case. However, the approval was limited to the Ninth Circuit's "linkage of possession to the purposes served by the privilege," and this Court expressly left open the question of "what qualifies as rightful possession enabling the possessor to assert the privilege," 409 U. S. at 330, n. 12.

A resolution of the question which this Court has thus left open is important to the delineation of the powers and limitations of government investigatory bodies to compel production of documents from citizens under investigation. The question has arisen repeatedly in enforcement proceedings brought by the IRS under Sections 7402(b) and 7604(a) of the Internal Revenue Code, and is critical to all public investigatory bodies and to all citizens from whom such information is sought.

III. There Is a Conflict Among the Courts of Appeals on Both of the Important Questions Which Are Raised by This Case.

The Third Circuit's holding that the mere transfer of documents from the taxpayers to their attorney, even though the transfer was solely for the purpose of legal representation and advice, vitiates and works a forfeiture of the client's protection from compelled production of the records is in direct conflict with decisions of two other circuits. In *United States v. Judson,* 322 F. 2d 460 (1963) and *Colton v. United States,* 306 F. 2d 633 (1963), the Ninth and Second Circuits respectively held that possession of records by an attorney is equivalent to possession by the client for purposes of the Fifth Amendment, where the documents were turned over to the attorney pursuant to the "attorney-client relationship." The holdings of the Ninth and Second Circuits would require that the present case be decided as though the documents sought were in the possession of the taxpayers when the summons was served. Erroneously, the Third Circuit failed to decide this question in the present case—a part II B of its opinion is conspicuously missing.

With respect to this question of whether the taxpayers themselves would have been protected from compelled production of the documents had they retained possession of the documents, there is also a conflict between courts of appeals. On facts virtually identical with those in the present case (except for the transfer of possession to the taxpayers' attorney), the Ninth Circuit has upheld the tax-

payers' claim of Fifth Amendment protection. *United States v. Cohen,* 388 F. 2d 464 (1967). The Sixth Circuit, however, has expressly declined to follow the reasoning of the Ninth Circuit, although it relied in part on facts not present in *Cohen* or in the present case. *United States v. Widelski,* 452 F. 2d 1, *cert. denied* 406 U. S. 918 (1971). Only this Court can resolve these conflicts.

IV. The Court of Appeals Erred in Ordering Taxpayers' Attorney to Comply With the IRS Summons.

A. The Third Circuit Erred in Holding That the Transfer of Records by the Taxpayers to Their Attorney Precluded Fifth Amendment Protection for the Taxpayers From Compelled Production of Those Records.

The taxpayers in the present case were under criminal investigation at the time they retained petitioner Fisher and delivered to him the records which the Government now seeks. The investigation was at all times conducted exclusively by the Intelligence Division of the IRS (N. T. 11, 22, 24). As this Court noted in *Donaldson v. United States,* 400 U. S. 517, the functions of the Intelligence Division are limited to criminal matters by regulations of the Treasury Department, 400 U. S. at 534-535. As the subjects of criminal investigation taxpayers had the right to consult with counsel. See *Escobedo v. Illinois,* 378 U. S. 478. The Internal Revenue Service explicitly recognizes this right, for it is the duty of a special agent to instruct the subject of an investigation, at their initial meeting, that the subject has the right to seek assistance of counsel before responding to any questions. IRS News Release IR-949, Nov. 26, 1968; 1968 C. C. H. Stand. Fed. Tax Rep. ¶ 6946.

While the Third Circuit's opinion in this case does not directly deny the right to counsel, it dramatically penalized the taxpayers for availing themselves of the right. The Third Circuit's denial of Fifth Amendment protection was predicated on the delivery of the records from the petitioner-taxpayers to their attorney, and the attorney's subsequent possession in carrying out his representation of the taxpayers in the criminal investigation. Such a penalty on the exercise of a basic due process right is impermissible. *Spevack v. Klein,* 385 U. S. 511; *Murdock v. Pennsylvania,* 319 U. S. 103; and see *Miami Herald Publishing Co. v. Tornillo,* 42 U. S. L. Week 5098 (1974); *Shelton v. Tucker,* 364 U. S. 479; *Talley v. California,* 362 U. S. 60 and *Speiser v. Randall,* 357 U. S. 513.

The penalty placed on exercise of the right to counsel by the Third Circuit is without any policy justification. The decision will needlessly and pointlessly complicate and encumber the provision of legal services by requiring examination of documents to take place at the client's home or office, or while the documents are otherwise in the client's possession. As the dissent noted:

> "The government conceded in oral argument that the Goldsmiths would have retained the right to assert the privilege if they had stayed in Fisher's office while he examined the papers in their presence or if they had insisted on his reviewing the papers in their home." (p. A37 *infra.*)

This entirely artificial distinction serves no purpose related to the Fifth Amendment.

The penalty imposed on taxpayers for consulting with counsel is particularly egregious in the present case, where the special agent was under a duty to advise the taxpayers that they were under criminal investigation and had a right

to consult counsel. IRS News Release IR-949, *supra;* N. T. 31-32. Thus, the IRS in effect encourages taxpayers to consult with counsel, and then successfully contends that they can easily and unwittingly set Fifth Amendment rights at naught by having done so. The record in this case strongly suggests that this sequence was not a coincidence. The special agent in this case acknowledged that he served the summons on petitioner-lawyer Fisher later on the very day in which Fisher had told the agent that he was going to return the records to his clients (N. T. 8).

Apart from Sixth Amendment considerations, this Court recognized in *Couch v. United States, supra,* that a person in certain situations might be deemed to have constructive possession of documents, enabling him to successfully assert Fifth Amendment protection from compelled disclosure, 409 U. S. at 333. This Court further indicated that a justifiable expectation of privacy in the relationship between the person and the actual possessor was an important consideration in determining whether there was constructive possession by the person asserting the Fifth Amendment protection.

If the principle of constructive possession has any meaning whatsoever, it necessarily must apply to an attorney representing a client who is under criminal investigation. This point was asserted by the Ninth Circuit in *United States v. Judson, supra:*

> "The government states that the evil which the Fifth Amendment sought to prevent is not present when the prosecution seeks evidence of A's guilt from B. But this argument ignores the realities of the relationship existing where B is A's attorney. An attorney is his client's advocate. His function is to raise all the just and meritorious defenses his client has. No other 'third party', nor 'agent', nor 'representative' stands

> in such a unique relationship between the accused and the judicial process as does his attorney. He is the only person besides the client himself who is permitted to prepare and conduct the defense of a matter under investigation. The attorney and his client are so identical with respect to the function of the evidence and to the proceedings which call for its production that any distinction is mere sophistry." 322 F. 2d at 467.

Accord, Colton v. United States, 306 F. 2d 633, 639 (2nd Cir. 1962); and see *Brody v. United States,* 243 F. 2d 378, 387 (1st Cir. 1957); 8 WIGMORE, EVIDENCE (McNaughton Rev. 1961), § 2307. It is significant that this Court in *Couch* referred to *United States v. Judson* as a case "where possession and ownership conjoined," although actual possession in that case as in this rested with the attorney and not the taxpayer, 409 U. S. at 330.

There can be no question that an individual who gives documents to an attorney representing him in a criminal matter has a justifiable expectation that the documents will be held in confidence. The attorney's obligation not to disclose information of a confidential nature to third parties is a tenet of legal ethics. ABA CODE OF PROFESSIONAL RESPONSIBILITY, ETHICAL CONSIDERATION 4-4, states in part:

> "The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge."

Thus, the distinction which the Third Circuit made between continued possession of documents by a client and possession by his attorney penalizes the exercise of

the right to counsel and ignores the purpose and the limitation pursuant to which the attorney holds the documents.

B. If the Records in This Case Were in the Constructive Possession of the Taxpayers at the Time the Summons Was Served, the Taxpayer Is Protected From Compulsory Production of the Records.

The decisions of this Court indicate that the basis of Fifth Amendment protection from compelled production of documents is possession in a personal capacity by the one asserting the privilege. While the precise parameters of this concept have yet to be delineated, the uncontradicted evidence in the record have demonstrated that this case is well within the concept.

The summaries of receipts and disbursements in the present case, taken directly from the taxpayers' cancelled checks and deposits, surely meet the criteria of "private books and papers" set forth in *Boyd v. United States,* 116 U. S. 616. Moreover, the nature of these documents and the history of the relationship between the accountant and petitioner-taxpayers demonstrate the expectation of the accountant and petitioner-taxpayers that the latter would have permament control of the documents. These basic facts are not disputed in the evidence nor in the findings or conclusions of the District Court.

This Court has never suggested that title ownership, or authorship, or origination, is a prerequisite for Fifth Amendment protection. In fact, *Couch v. United States, supra,* confirms that ownership is not a prerequisite, and this Court in *Wilson v. United States,* 221 U. S. 361, 378, stated: "Where one's private documents would tend to incriminate him, the privilege exists although they were actually written by another person." The personal nature of the documents is not changed by ownership, authorship

or origination, and limiting Fifth Amendment protection by these tests would put undue emphasis on the form of record keeping used by a taxpayer. *Cf. Couch v. United States, supra,* at 331. Both the personal compulsion on the individual to incriminate himself and authentication of the documents named in the summons would occur as a result of enforcement of the summons in this case. See *Curcio v. United States,* 135 U. S. 118, 125; *United States v. Cohen,* 388 F. 2d 464, 466, n. 3 (9th Cir. 1967).

In *Couch v. United States* this Court referred with approval to the Ninth Circuit's "linkage [in *Cohen*] of possession to the purposes served by the privilege," 409 U. S. at 330, n. 12. As Judge Hunter noted in his dissent below, the present case is, apart from the constructive possession issue, virtually identical to *Cohen* on its facts.

V. The Basic Problem Presented by This Case Is Recurring and of Great Importance.

Stripped to its essentials the decision of the court below permits the Government by summons to make a lawyer potentially incriminate his client without the client's consent. The implications for the tax bar and the taxpayer are serious and they extend beyond the area of taxation. It is a common occurrence for persons to have their accountants keep their personal financial records and to prepare income tax returns from such records. If the filing of the return results in a criminal investigation by the IRS, the taxpayer will inevitably seek the advice of counsel. The decision below would revolutionize the legal representation which would follow, for it exhalts technical formalities of physical locus and physical presence above the realities of legal practice and gives inexplicable short shrift to the confidentiality of the attorney-client relationship.

CONCLUSION.

For the reasons stated above a Writ of Certiorari should be issued to review the judgment of the court below.

Respectfully submitted,

WILLIAM T. COLEMAN, JR.,
RICHARD L. BAZELON,
2600 The Fidelity Building,
Philadelphia, Pa. 19109
Attorneys for Petitioners.

Of Counsel:
DILWORTH, PAXSON, KALISH,
LEVY & COLEMAN,
2600 The Fidelity Building,
Philadelphia, Pa. 19109

Dated: July 26, 1974

APPENDIX A.

IN THE

United States District Court

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MISC. No. 72-18.

UNITED STATES OF AMERICA AND
ALAN M. FELDMAN,
SPECIAL AGENT, INTERNAL REVENUE SERVICE,
Petitioners,

v.

SOLOMON FISHER,
Respondent.

Memorandum and Order.

DAVIS, *J.*

The Internal Revenue Service (IRS) issued a summons pursuant to 26 U. S. C. § 7602 in which they seek to make Solomon Fisher, Esquire, produce certain records which are presently in his possession. The summons was issued to him on December 1, 1971, and it sought certain documents prepared by Harold Berson, a certified public accountant, for Morris and Sally Goldsmith for the tax years 1969 and 1970.

An investigation was being conducted by Alan M. Feldman, Special Agent, Internal Revenue Service on the possible tax liability of the Goldsmiths. In the latter part

of July, 1971, Mr. Feldman spoke to Mr. Goldsmith and explained to him that he would like to make an appointment to discuss his tax liabilities (N. T. 20). On August 3, 1971, Mr. Fisher contacted Agent Feldman and told him that he represented the Goldsmiths and that Mr. Goldsmith would not appear for the appointment which had been previously made (N. T. 20 and 21). In the early part of August, 1971 Mr. Goldsmith requested that Mr. Berson give the tax records to him because of the tax investigation (N. T. 46 and 47). On August 17, 1971 the Goldsmiths turned over to Mr. Fisher, who is their personal attorney, the records which are the subject matter of the present summons (N. T. 3).

On October 22, 1971 Agent Feldman contacted Mr. Berson and served a summons on Mr. Berson seeking documents which related to the tax liability of the Goldsmiths with a return date of November 3, 1971. Mr. Berson testified that he had contacted Mr. Goldsmith and told him that he would like to have the documents back because of the summons which had been served on him (N. T. 49). Previous to the investigation, Mr. Berson had kept various documents of the Goldsmith's file which dated as far back as 1959 (N. T. 50). On November 3, 1971, the return date of the summons, Mr. Berson could not get the records back (N. T. 49 and 50).

On December 1, 1971, the summons which the I. R. S. now seeks to enforce was served upon Mr. Fisher. Mr. Fisher reported to the I. R. S. on December 13, 1971; however, he had indicated previously that he would not turn over the records to the I. R. S., although he would bring them with him in compliance with the summons (N. T. 4).

The present action to enforce the summons served on Mr. Fisher was brought on February 8, 1972. A hearing on the Order to Show Cause was held on March 3, 1972. The Court allowed Morris and Sally Goldsmith to intervene as a party. Subsequently, the notes of testimony were transcribed and lengthy briefs were filed by both parties.

Initially, the first issue which is before the Court is: Was the summons issued for a valid purpose. Recently, the Supreme Court in *Donaldson v. United States,* 400 U. S. 517 (1971), after reviewing the complete administrative procedure and various judicial decisions on the purpose of § 7602, stated at page 536:

> We hold that under § 7602 an internal revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution.

It is evident that no recommendation for criminal prosecution has been instituted by the I. R. S. There was no indication from Mr. Feldman's testimony, whether on direct or cross-examination, that a recommendation for criminal prosecution had been put forth.

Also, the fact that a Special Agent of the Intelligence Division of the I. R. S. was working on the case and not a Revenue Agent of the Audit Division does not suggest that a recommendation for criminal prosecution had been instituted or that this was not conducted in good faith by the I. R. S. The Supreme Court in *Donaldson, supra,* in discussing § 7602 stated that Congress clearly authorized the use of the summons in investigating what may prove to be criminal conduct. The Court went on to state on page 535 that, "There is no statutory suggestion for any meaningful line of distinction, for civil as compared with criminal purposes, at the point of a special agent's appearance."

The purpose of the summons is merely to examine the possible tax liability of the Goldsmiths. See Treas. Regs. § 301.7602-1(c)(4) and 26 CFR § 301.7602-1(c)(4). Agent Feldman's testimony clearly indicated the information which the I. R. S. wished to obtain was not information the Commissioner already had in his possession. The criteria

for enforcement of the summons established in *United States v. Powell,* 379 U. S. 48 (1964), has clearly been met.

The next determination which must be made is whether or not the enforcement of the summons would violate the Goldsmith's Fifth Amendment rights. It is the position of Mr. Fisher that the documents prepared by the accountant, Mr. Berson, for the taxpayers and turned over to the Goldsmiths who subsequently turned them over to Mr. Fisher as their counsel for the taxpayers, are within the privilege against self-incrimination and that counsel can decline to disclose them.

The question of ownership of the documents must be resolved initially. First, work papers of an accountant are his property unless the contrary is shown. *United States v. Widelski,* 452 F. 2d 1 (6th Cir. 1971); *United States v. Zakufansky,* 401 F. 2d 68, 70 (7th Cir. 1968), cert. denied, 393 U. S. 1021 (1969); *In re Fahey,* 300 F. 2d 383 (6th Cir. 1961); *United States v. Boccuto,* 175 F. Supp. 886 (D. N. J. 1959) App. dism. 274 F. 2d 860 (3rd Cir. 1960). Secondly, if the papers had remained in the possession of the accountant, he would have been required to produce the papers. *Falsone v. United States,* 205 F. 2d 734 (5th Cir. 1953); *Sole v. United States,* 228 F. 2d 682 (8th Cir. 1956). Thirdly, if the taxpayer owned the papers, or if they were in his indefinite and rightful possession, they would have been protected under the Fifth Amendment right of his privilege against self-incrimination. *United States v. Cohen,* 388 F. 2d 464 (9th Cir. 1967); *Colton v. United States,* 306 F. 2d 633 (2d Cir. 1962) cert. denied 371 U. S. 951 (1963); *Application of House,* 144 F. Supp. 95 (N. D. Cal. 1956). Some courts have held that the taxpayer's attorney in possession of accountant's work papers has no right to assert his client's privilege against self-incrimination. *Bouschor v. United States,* 316 F. 2d 451 (8th Cir. 1963); *In re Fahey, supra; United States v. Boccuto, supra.* On the other hand, some courts have held the attorney can assert the right. *United States v. Judson,* 322 F. 2d 460 (9th Cir. 1963); Cotton v. United States, supra; *Application of House, supra.*

Mr. Berson, the accountant, testified that he wanted to determine the taxpayers profit and tax liability for 1969 and 1970. This was done by an analysis of disbursements and receipts. Also, for Mrs. Goldsmith, the accountant would run trial balancies to determine her profit. As far as Mr. Goldsmith was concerned, Mr. Berson would take a summary of his receipts and disbursements to obtain the income and expenses for Mr. Goldsmith (N. T. 57 and 58). Additionally a complete ledger was kept for Mrs. Goldsmith (N. T. 61).

In *United States v. Peoples Deposit Bank and Trust Co.,* 112 F. Supp. 720 (E. D. Ky. 1953), affirmed 212 F. 2d 86 (6th Cir. 1954), cert. denied 348 U. S. 838 (1954), the District Court held, *inter alia,* that records and ledger sheets which related to taxpayer's banking business and which the I. R. S. sought to subpoena from the bank, were the property of the bank, and the taxpayer had no proprietary interest in them. In *United States v. Pizzo,* 260 F. Supp. 216 (S. D. N. Y. 1966), where the accountant's work was confined to the preparation of the taxpayer's returns, the Court found, on the basis of the accountant's testimony, that:

> . . . "work papers" means any papers "where you have records recorded on it and the common form of work papers are the columnar column" [type of paper]. Memorandum sheets could be work papers and "it might be almost anything from the taxpayer's books showing income or expenditures."

The papers prepared by Mr. Berson are those types which accountants consider work papers. Mr. Berson prepared

a ledger and ran a trial balance for Mrs. Goldsmith; he ran a summary for Mr. Goldsmith. Notwithstanding Mr. Berson's testimony that he believed the records to be the taxpayer's property (N. T. 52), this Court is of the opinion that it is not bound by the assertions of the taxpayer, accountant or both. *Deck v. United States,* 119 U. S. App. D. C. 240, 339 F. 2d 739 (1965), cert. denied 379 U. S. 967 (1965); *Bouschor, supra; Boccuto, supra; Sale, supra.*

At no time prior to the call from Agent Feldman did Mr. Goldsmith ask for the return of the work papers. It was only after the I. R. S. agent sought to set up an appointment with the taxpayer that the taxpayers requested the work papers returned to them. Mr. Berson testified that once he received the summons, he tried to get the work papers back from Mr. Goldsmith (N. T. 49).

These factors taken together with the case law show that the work papers were the property of the accountant.

The taxpayers, by way of their attorney, assert that, independent of the ownership concepts of the papers, they may raise the privilege against self-incrimination merely because of their rightful and indefinite possession of the papers, relying on *United States v. Cohen, supra.* However, the Third Circuit in *United States v. Egenberg,* 443 F. 2d 512 (3rd Cir. 1971), held, *inter alia,* that where a third party has a superior right to possession of the papers, the witness cannot withhold them. The Court in Egenberg stated on page 518:

> This conclusion is not at variance with the holding of United States v. Cohen, 388 F. 2d 464 (9 Cir. 1967) on which the district court relied. There is language in *Cohen* suggesting that mere possession of third party papers is enough to bring those papers within the witness' privilege. That language is inconsistent with the holdings of the Supreme Court and the reasoning of the opinion is unpersuasive.

The facts in the instant case, as presented before this Court, demonstrate that the papers were and are the property of the accountant. They only left his possession after the taxpayer learned of the investigation. The transfer of the papers seems to indicate that this was an attempt to thwart the government's investigation. Of course, there is no attorney-client privilege which could be claimed since the accountant's transfer of nonprivileged papers to the client would not create a privilege when the client turned the papers over to his attorney. See *United States v. Kelly,* 311 F. Supp. 1216 (E. D. Pa. 1969).

For the above reasons, the production of the documents in question is hereby ordered.[1]

ORDER.

And Now, this 4th day of August, 1972 it is hereby Ordered that the respondent, Solomon Fisher, Esquire, is directed to appear before the petitioner, Special Agent Feldman at Room 752, 401 N. Broad Street, Philadelphia, Pennsylvania, within thirty (30) days and produce for inspection those items which are enumerated in the summons which the respondent received from the petitioner dated December 1, 1971.

John Morgan Davis
John Morgan Davis, *J.*

---

1. This Opinion constitutes the prerequisite findings of fact and conclusions of law required by Rule 52(a) of Federal Rules of Civil Procedure. 28 U. S. C. Rule 52(a).

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 72-2001

UNITED STATES OF AMERICA and
ALAN M. FELDMAN, Special Agent,
Internal Revenue Service

v.

SOLOMON FISHER
MORRIS GOLDSMITH
SALLY GOLDSMITH [Intervening Party Defendants],

SOLOMON FISHER, ESQUIRE, MORRIS GOLDSMITH and SALLY GOLDSMITH, *Appellants.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

(District Court Misc. No. 72-18)

Argued May 25, 1973
Before: ALDISERT and HUNTER, *Circuit Judges,* and STAPLETON, *District Judge.*

Reargued April 10, 1974
Before: SEITZ, *Chief Judge,* and VAN DUSEN, ALDISERT, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges.*

Opinion of the Court.

(Filed June 7, 1974)

Solomon Fisher, Esq.
Richard L. Bazelon, Esq.
Dilworth, Paxson, Kalish, Levy and Coleman
Philadelphia, Pennsylvania
Attorneys for Appellants

Scott P. Crampton, Assistant Attorney General
Meyer Rothwacks, Esq.
Tax Division
Department of Justice
Washington, D. C.

Robert E. J. Curran, United States Attorney
Philadelphia, Pennsylvania
Attorneys for Appellees

ALDISERT, *Circuit Judge.*

Couch v. United States, 409 U. S. 322 (1973), held that where a taxpayer had effectively surrendered possession of her business records to her accountant and the accountant was served with an Internal Revenue Service summons, the taxpayer could not successfully assert the Fifth Amendment privilege against compelled incrimination. The question presented by this taxpayers' appeal from a district court order enforcing a summons issued pursuant to 26 U. S. C. § 7602 is a spin off of the *Couch* issue: where work papers owned by the accountant and prepared by him for tax purposes at the taxpayers' request are transferred from

the accountant to the taxpayers and thence by them to their attorney, are the papers immunized from a summons directed against the attorney?

Most of the narrative or historical facts are not in dispute. In the summer of 1971, Feldman was employed as a Special Agent of the Intelligence Division of the Internal Revenue Service and was assigned to investigate the tax liability of the Goldsmiths for years 1969 and 1970. No employee of the Audit Division of the Service was then participating in the investigation. In late July of that year, Feldman spoke with Mr. Goldsmith and made an appointment with him to discuss Mr. Goldsmith's tax liability. On August 3, 1971, Morris and Sally Goldsmith retained Fisher to represent them, and Fisher called Feldman to advise him that Mr. Goldsmith would not appear for the appointment.

In early August of 1971,[1] the Goldsmiths obtained from their accountant, Harold Berson, certain records which constituted "the balance" of records concerning the Goldsmiths which Berson then had in his possession. Some dated as far back as 1959. On August 17, 1971, the Goldsmiths turned these records over to Fisher. A stipulation of the parties, as articulated by Fisher, was as follows:

> [O]n August 17, 1971 Morris Goldsmith and Sally Goldsmith turned over to me certain records which I now have in my possession. Such records were turned over to me for my use in representing them, furnishing them with legal advice, and from the time those records were turned over to me to the present time I have been using them for that purpose.

These records included the "analyses" which the government seeks to inspect. These "analyses," designated

1. Berson could not remember the exact date, but estimated it to be "[t]he 4th or 5th of August. . . ."

"analysis of receipts and disbursements," are essentially lists of income and expenses compiled by Berson from cancelled checks and deposit receipts supplied by the Goldsmiths, but do not include the checks and deposit receipts themselves.

On October 22, 1971, Feldman served a summons on Berson seeking documents which related to the tax liability of Morris Goldsmith. Berson told Feldman at the time of service that he had no documents of this character and that all documents which he had previously possessed had been turned over to Mr. Goldsmith. Feldman nevertheless put a return date of November 3rd on the summons because Berson indicated he would try to get the papers back.[2] Berson testified that he "contacted Mr. Goldsmith and told him that . . . [he, Berson,] would like to get the papers back, that . . . [he] was requested by the Government to bring them to their offices." Berson appeared on November 3rd to report that he did not have the documents sought.

On December 1, 1971, the summons which the government now seeks to enforce was served upon Fisher, directing him to appear "to give testimony relating to the tax liability or the collection of the tax liability" of Morris Goldsmith and to bring with him, among other things, an "Analysis of Receipts and Disbursements for Morris Goldsmith for 1969 and 1970" and an "Analysis of the Receipts and Disbursements of Sally Goldsmith for 1969 and 1970." Fisher appeared with the records in response to the summons, but refused to permit their inspection. This enforcement action was then commenced. The Goldsmiths were permitted to intervene and, together with Fisher, defended on the grounds (1) that the summons was invalid and (2)

2. Feldman testified that Berson "said that he would contact Mr. Fisher and ask for return of his records in compliance with the summons." Berson testified that he said he "would speak to Mr. Goldsmith and find out whether he could return the records to me." (I.e., Berson.)

that production would violate the Goldsmiths' rights under the Fifth Amendment to the United States Constitution.

After a hearing, the district court found as a fact that "no recommendation for criminal prosecution . . . [had] been instituted by the I. R. S." during the relevant period and that the summons was issued in good faith. It also found that "[t]he purpose of the summons is merely to examine the possible tax liability of the Goldsmiths." Considering *Donaldson v. United States,* 400 U. S. 517 (1971), as controlling, the court held that the summons was issued for a valid purpose. The court further found that the records sought were owned by Berson, rejected the constitutional argument and ordered production.[3]

Appellants here renew their dual attack on the summons. We address both contentions.

---

3. The district court reasoned:

The taxpayers, by way of their attorney, assert that, independent of the ownership concepts of the papers, they may raise the privilege against self-incrimination merely because of their rightful and indefinite possession of the papers, relying on United States v. Cohen, . . . [388 F. 2d 464 (9th Cir. 1967)]. However, the Third Circuit in United States v. Egenberg, 443 F. 2d 512 (3rd Cir. 1971), held, inter alia, that where a third party has a superior right to possession of the papers, the witness cannot withhold them.

* * *

The facts in the instant case, as presented before this Court, demonstrate that the papers were and are the property of the accountant. They only left his possession after the taxpayer learned of the investigation. The transfer of the papers seems to indicate that this was an attempt to thwart the government's investigation. Of course, there is no attorney-client privilege which would be claimed since the accounant's transfer of non-privileged papers to the client would not create a privilege when the client turned the papers over to his attorney. See United States v. Kelly, 311 F. Supp. 1216 (E. D. Pa. 1969).

For the above reasons, the production of the documents in question is hereby ordered.

352 F. Supp. 731, 734-735 (E. D. Pa. 1972) (footnote omitted).

I.

Appellants contend that the summons served upon Mr. Fisher, pursuant to 26 U. S. C. § 7602,[4] is unenforceable because its sole object is to obtain evidence to use in a criminal prosecution. *Reisman v. Caplin,* 375 U. S. 440, 449 (1964). In support of this proposition, appellants emphasize that Special Agent Feldman was the sole government representative engaged in the investigation of the Goldsmiths' tax liability and that an official statement of the Internal Revenue Service describes the function of the Intelligence Division as an arm of the Service which investigates and enforces criminal violations of various tax laws of the United States.[5] On this showing alone the ap-

---

4. Section 7602 of the Internal Revenue Code provides:

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

5. The statement reads:

The Intelligence Division enforces the criminal statutes applicable to income, estate, gift, employment and excise tax laws (except those relating to alcohol, tobacco, narcotics and certain firearms), by developing information concerning alleged criminal violations thereof, evaluating allegations and indications of such violations to determine investigations to be undertaken, inves-

pellants would have us reverse the district court's holding that the summons was issued for a valid purpose. This we decline to do.

It is now well settled that the possibility that criminal prosecution as well as civil liabilities may arise from a tax investigation is not a sufficient ground for refusing to enforce a summons issued under Section 7602 in good faith and prior to a recommendation for prosecution. *Donaldson v. United States, supra.* In *Donaldson* the Supreme Court, in rejecting a contention similar to that here made, said:

> Congress clearly has authorized the use of the summons in investigating what may prove to be criminal conduct. * * * There is no statutory suggestion for any meaningful line of distinction, for civil as compared with criminal purposes, at the point of the special agent's appearance. * * * To draw a line where a special agent appears would require the Service, in a situation of suspected but undetermined fraud, to forego either the use of the summons or the potentiality of an ultimate recommendation for prosecution. We refuse to draw that line and thus to stultify enforcement of federal law. * * *
>
> We hold that under § 7602 an internal revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution.[6]

5. (Cont'd.)
tigating suspected criminal violations of such laws, recommending prosecution when warranted, and measuring effectiveness of the investigation and prosecution processes. The Division assists other Intelligence offices in special inquiries, drives and compliance programs and in the normal enforcement programs, including those combating organized wagering, racketeering and other illegal activity, by providing investigative resources upon regional or National Office request. It also assists U. S. attorneys and Regional Counsel in the processing of Intelligence cases, including the preparation for and trial of cases.
36 Fed. Reg. 887 (1971).

It is also well established that the burden of showing an improper purpose is on the taxpayer. *Donaldson v. United States, supra,* 400 U. S. at 527; *United States v. Powell,* 379 U. S. 48, 58 (1964); *United States v. Erdner,* 422 F. 2d 835 (3d Cir. 1970); *United States v. De Grosa,* 405 F. 2d 926 (3d Cir.), *cert. denied sub nom. Zudick v. United States,* 394 U. S. 973 (1969). The district court found as a fact that "no recommendation for criminal prosecution has been instituted by the I. R. S." Nor did it find that the summons was issued in other than good faith. Moreover, the court affirmatively found that "the purpose of the summons . . . [was] merely to examine the possible tax liability of the Goldsmiths." These findings are not clearly erroneous. *Krasnov v. Dinan,* 465 F. 2d 1298, 1302-1303 (3d Cir. 1972).[7]

Thus, taxpayers would have us hold that their burden is met by a mere showing that a Special Agent of the Service's Intelligence Division was the only person assigned to investigate their tax liability. If we were to

6. 400 U. S. at 535-536. In *Couch v. United States, supra,* 409 U. S. at 326 n. 8 (1973), the Supreme Court emphasized that "*Donaldson* cautioned only that the summons be issued in good faith and prior to a recommendation for criminal prosecution." On this record, as in *Couch,* "neither of those conditions is successfully challenged here."

7. "It is the responsibility of an appellate court to accept the ultimate factual determination of the fact-finder unless that determination either (1) is completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the supportive evidentiary data. Unless the reviewing court establishes the existence of either of these factors, it may not alter the facts found by the trial court. To hold otherwise would be to permit a substitution by the reviewing court of its finding for that of the trial court, and there is no existing authority for this in the federal judicial system, either by American common law tradition or by rule and statute."

accept taxpayers' argument we would be drawing a line where a special agent appears, a line which the Court in *Donaldson* expressly refused to draw. Both in *De Grosa* and *Erdner* we refused to hold that such evidence, in itself, satisfied the taxpayer's burden of proof. We reaffirm those holdings today.

II.

Thornier issues are raised by taxpayers' claim that production of the "analyses" in the possession of Fisher would violate their rights against self-incrimination. This contention is based, in part, upon the assertion that the only permissible inference to be drawn from the record below is that the Goldsmiths owned the records sought. The finding of the district court that the analyses were the property of the accountant is not clearly erroneous, *Krasnov v. Dinan, supra.*[8] We accordingly accept that finding.

8. Berson testified that personnel in his accounting firm prepared the "analyses" under his direction; that they were used, among other things, to prepare various tax returns; and that the records remained in his possession and are usually forwarded to the client every three or four years because the accumulation gets out of hand. (App. at 65-66.) Berson also testified he had an "understanding" for over twenty-five years with the Goldsmiths that the "analyses" belonged to the client, and he regarded them as "client's papers." Goldsmith testified the cash receipts and disbursement records which formed the basis for the "analyses" were regarded as his property. When asked specifically as to the ownership of the "analyses," his answer was not responsive:

> Q. With respect to the cash receipts and cash disbursements records for your business did you regard them as your property or Mr. Berson's property?
>
> A. I would regard them as my property.
>
> Q. Did you have an understanding or agreement with Mr. Berson that they were your property?
>
> A. I say yes because for the last thirty years that he has been keeping my books they have been returned to me.
>
> Q. And any time you asked for them you were given them?
>
> A. Many times Mr. Berson would ask me to come and please take them because he didn't have room.
>
> * * *

If ownership *vel non* were the test of the scope of the Fifth Amendment privilege, our analysis would be at an end. But such is not the test, for the Fifth Amendment privilege focuses on personal compulsion upon the person asserting it. Possession, not ownership, "bears the closest relationship to the personal compulsion forbidden by the Fifth Amendment." *Couch v. United States, supra,* 409 U. S. at 331. Thus we are led to Goldsmiths' argument

8. (Cont'd.)

> Q. Mr. Goldsmith, would you tell me what the substance of that agreement between yourself and Mr. Berson is with respect to the cash receipts and disbursements analysis?
>
> A. I submit them to Mr. Berson and from that he determines my tax. I have been doing this for the last twenty-five, thirty years.
>
> Q. I see. And do you have a written agreement with Mr. Berson with respect to whose property these records will be after they are prepared?
>
> A. No, sir.

(App. at 85-87.)

Special Agent Feldman's testimony directly contradicted that of Berson. Feldman testified:

> Q. And isn't it also a fact that by the time you got around to serving a summons on Mr. Fisher that you had ascertained from Mr. Berson just what work papers he had prepared?
>
> A. He told me exactly what he had prepared and that is what I put on the summons.
>
> Q. He also told you that they were his work papers, did he not?
>
> A. That's correct.

(App. at 60-61.)

Faced with testimony that an accounting firm prepared the "analyses"; that they usually remained in the possession of the firm for a period of time; that the records were requested by the taxpayer after Feldman had sought to set up an appointment with Morris Goldsmith; that Berson called Goldsmith after Berson was served with the summons and told him that he would like to get the papers back; and that Feldman's and Berson's testimony concerning the ownership of the papers was in direct conflict, the court determined as a fact that the "analyses" were the property of the accountant. This finding is not completely devoid of minimum evidentiary support displaying some hue of credibility; nor does it lack a rational relationship to the supporting evidentiary data. *Krasnov v. Dinan, supra.* Thus, we will disturb it.

that, even if Berson is held to own the "analyses," Goldsmiths' transitory possession of the records and their subsequent possession by Fisher established that requisite degree of privacy so that it can be said that enforcement of the summons issued to Fisher amounted to that type of personal compulsion against the Goldsmiths which is prohibited by the Fifth Amendment. To be successful with this argument appellants must convince us of the validity of two propositions: First, if the Goldsmiths had not given the "analyses" to Fisher, they could have successfully resisted the summons because the documents sought would have been in a rightful personally privileged possession, and, second, the Goldsmiths should not be held to have lost their privilege solely because they surrendered actual possession to Fisher for the purpose of obtaining legal advice in connection with the investigation. The government disputes these propositions, arguing that the analyses would not have been within the scope of the privilege in the hands of the Goldsmiths and that, in any event, the Goldsmiths are barred from asserting the privilege because, in fact, they had neither ownership nor possession at the time of the service of the summons.

A.

The facts in this case must be compared with those in *Couch*. Here, ownership was found to be in the accountant; there, ownership was in the taxpayer. Here, possession was in the lawyer, the subject of the summons; there, possession was in the accountant, also the subject of the summons. Here, the taxpayers, as in *Couch*, had to be aware that at least summaries of the information furnished the accountant from which he fashioned his records had to be disclosed in certain tax returns. But that which distinguishes this case from *Couch* is the additional question

of the reasonable likelihood of privacy and freedom from compulsion expected by the taxpayers at the time they delivered the accountant's records to their lawyer.

In *Couch*, as previously noted, the Supreme Court rejected the thesis that the Fifth Amendment privilege was equated with ownership. The Court said: "The criterion for Fifth Amendment immunity remains not ownership of property, but the 'physical or moral compulsion exerted.' • • • We hold today that no Fourth or Fifth Amendment claim can prevail where, as in this case, there exists no legitimate expectation of privacy and no semblance of governmental compulsion against the person of the accused." 409 U. S. at 336 (footnote omitted). It emphasized that "actual possession of documents bears the most significant relationship to Fifth Amendment protections . . ." 409 U. S. at 333, acknowledged the possibility of constructive possession in certain cases and refrained from deciding "what qualifies as rightful possession enabling the possessor to assert the privilege." 409 U. S. at 330 n. 12.

Because concepts of "ownership" and "possession" and "expectations of privacy" dominate the text of the cases, it becomes important to remind ourselves that these are organons of the decisional process only. Although effective as jurisprudential tools, these concepts are not, in and of themselves, controlling. This "is a constitution we are expounding."[9] We must never wander from the principle that what the Fifth Amendment prohibits is compelled incrimination.

Supporting the notion that there may not be compelled production of "a man's private books and papers" is the 1886 case of *Boyd v. United States*, 116 U. S. 616, 633, whose vital signs are still given formal recognition, *Bellis v. United States*, — U. S. — (No. 73-190, 42 U. S. L. W.

9. *McCulloch v. Maryland*, 4 WHEAT. 316, 407 (1819).

4789, May 28, 1974), *Couch v. United States, supra,* 409 U. S. at 330, but whose vigor has been seriously sapped by subsequent analyses by the Supreme Court. The *ratio decidendi* of *Boyd* was premised on the notion that court-ordered production of a person's "private papers" to be used as evidence to convict him of crime violated the Fourth as well as the Fifth Amendment. Fourth Amendment considerations do not detain us; such an argument has not been presented in this appeal.[10]

Boyd's Fifth Amendment premise was based on the twin concepts of ownership and possession. Although addressing property notions in the context of the Fourth Amendment, *Warden v. Hayden,* 387 U. S. 294, 304 (1967), emphasized:

> The premise that property interests control the right of the Government to search and seize has been discredited. Searches and seizures may be "unreasonable" within the Fourth Amendment even though the Government asserts a superior property interest at common law. We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts. See *Jones v. United States,* 362 U. S. 257, 266; *Silverman v. United States,* 365 U. S. 505, 511. This shift in emphasis from property to privacy has come about through a subtle interplay of substantive and procedural reform.

We detect the same "shift in emphasis from property to privacy" in the Court's treatment of the Fifth Amend-

10. Moreover, this argument finds little support today. See Judge Friendly's scholarly treatment in *In re Horowitz,* 482 F. 2d 72, 75-79 (2d Cir.), *cert. denied,* 414 U. S. 867 (1973), and in *The Fifth Amendment Tomorrow: The Case for Constitutional Change,* 37 U. Cin. L. Rev. 671, 701-703 (1968).

ment in compelled production of documents. "The criterion for Fifth Amendment immunity remains not ownership of property. . . .", *Couch v. United States, supra,* 409 U. S. at 336;[11] "the papers and effects which the privilege protects must be the private property of the person claiming the privilege, or at least in his possession in a purely personal capacity." *United States v. White, supra,* 322 U. S. at 699.

Bellis v. United States, supra, — U. S. — at —, 42 U. S. L. W. at 4790, reaffirms this shift in emphasis:

> The Court's decisions holding the privilege inapplicable to the records of a collective entity also reflect a second, though obviously interrelated policy underlying the privilege, the protection of an individual's right to a "private enclave where he may lead a private life." *Murphy v. Waterfront Comm'n.,* 378 U. S. 52, 55 (1964). We have recognized that the Fifth Amendment "respects a private inner sanctum of individual feeling and thought"—an inner sanctum which necessarily includes an individual's papers and effects to the extent that the privilege bars their compulsory production and authentication—and "proscribes state intrusion to extract self-condemnation." *Couch v. United States, supra,* at 327. See also *Griswold v. Connecticut,* 381 U. S. 479, 484 (1965). Protection of individual privacy was the major theme running through the Court's decision in *Boyd.* . . .

11. Corporate and union records and records of at least certain partnerships actually possessed by the custodians in a representative rather than a personal capacity cannot be the subject of the personal privilege against self-incrimination. *Bellis v. United States, supra; United States v. White,* 322 U. S. 694, 699 (1944); *Wilson v. United States,* 221 U. S. 361 (1911). Incorporated banks, like other artificial organizations, have no privilege against compulsory self-incrimination. *California Banker Association v. Schultz,* — U. S. — (42 U. S. L. W. 4481, 4491, April 1, 1974).

United States v. Egenberg, 443 F. 2d 512 (3d Cir. 1971), emphasizes these basic principles.

Couch does not undercut *Egenberg*. *Couch* simply articulates that ownership of papers *per se* does not carry with it a vesting of the privilege against self-incrimination, that actual possession of documents bears the most significant relationship to Fifth Amendment protections against state compulsions upon the individual accused of crime, and that there may be examples where constructive possession is so clear or relinquishment of possession is so temporary and insignificant as to leave the personal compulsions upon the accused substantially intact.

The case *sub judice* presents a factual array of ownership of the records in the accountant, a shift in their possession from the accountant to the taxpayers at the taxpayers' request upon advice of Fisher only a day or two after Fisher began his representation and broke Morris Goldsmith's appointment with agent Feldman, a "temporary and insignificant" history of actual possession in the taxpayers and actual possession in a third party at the time of the issuance of the summons. We fail to see how this factual complex gives rise to that element of personal compulsion upon the taxpayers which is the hallmark of the right against compulsory self-incrimination. Thus, we have no difficulty in concluding that, unless the attorney-client relationship intervenes, this case is squarely controlled by *Couch*.

In this appeal the taxpayers do not rely on the attorney-client privilege *qua* privilege. Thus, the attorney-client relationship is relevant to our Fifth Amendment inquiry only as an indicia of the degree of privacy or freedom from compulsion to be expected by the taxpayers when they transferred the records to their attorney. Stated otherwise, the relationship is relevant only to a determination of whether these records, owned by the accountant, have the capacity of coming within the penumbra of the *Boyd* rule.

Papers otherwise not endowed with Fifth Amendment protection cannot be transmuted into a privileged status merely because of the act of delivery to a lawyer. People have constitutional rights, papers do not. Thus, the claim to the Fifth Amendment privilege must emanate from the taxpayers' rights. And in the attorney-client relationship, the rights must flow upward from the taxpayer; not downward from the attorney.

Judge Friendly has reminded us:

> Certain basic principles, however, are well-established. The privilege finds its justification in the need to allow a client to place in his lawyer the "unrestricted and unbounded confidence", United States v. Kovel, *supra,* 296 F. 2d [918 (2d Cir. 1961)] at 921, that is viewed as essential to the protection of his legal rights. But the privilege stands in derogation of the public's "right to every man's evidence", 8 Wigmore, *supra,* § 2192, at 70, and as "an obstacle to the investigation of the truth," *id.,* § 2291, at 554; thus, as Wigmore has said, "It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle." *Id.* It must be emphasized that it is vital to a claim of privilege that the communications between client and attorney were made in confidence and have been maintained in confidence.

In re Horowitz, supra, 482 F. 2d 72, at 81-82.

Here, the analyses of cash receipts and disbursements were prepared by the accountant, not the taxpayers. They

were prepared by him for the purpose of forwarding to appropriate tax authorities a declaratoin of the taxpayers' taxable status.[12] The analyses were not prepared by the client-taxpayers or by the accountant for some personal, private, and confidential purpose for disclosure to the taxpayers' lawyer only. The taxpayers enjoyed no history of extended actual possession of the analyses. Their actual possession was fleeting and transitory, limited to the act of delivery from the accountant's office to the office of their lawyer at his request. Thus, if the taxpayers are to succeed in their effort, they must prove that their brief experience of actual possession for a limited purpose coupled with turning their accountant's records over to their attorney has the legal capacity to generate a subsequent right of constructive possession of sufficient intensity to elevate those records into the required category of their "private books and papers." We are unwilling to attribute a Fifth Amendment protection to the accountant's work product based on such a limited possession by his client.

The judgment of the district court will be affirmed.

GIBBONS, *Circuit Judge,* concurring:

I join in Judge Aldisert's opinion, but add a caveat with respect to some inferences which might be drawn from it for other situations. As Professor McNaughton in his revision of 8 Wigmore on Evidence § 2263 (1961) explains, there are three possible forms of disclosure to which the privilege against self-incrimination might arguably apply.

(1) self-incriminating disclosures that are testimonial (*i.e.*, communicative or assertive) in nature;

12. There was also testimony that the "analyses" were used by the Goldsmiths when the bank needed them for loan applications.

(2) self-incriminating disclosures which, though not testimonial in the communicative or assertive sense, involve cooperative participation by a witness; or

(3) any evidence whatsoever obtained from a witness which might incriminate him, whether or not his cooperative participation is involved.

In *Boyd v. United States,* 116 U. S. 616 (1886) the Court considered the application of the fourth and fifth amendments to a statute, similar to Rule 36 of the Federal Rules of Civil Procedure, authorizing the service of a notice by the government on a party in a civil suit to produce a book, invoice or paper in court, and providing that if the party failed to produce the allegations in the government's motion "shall be taken as confessed, unless his failure or refusal to produce the same shall be explained to the satisfaction of the court." Act of June 22, 1874, § 5, 18 Stat. 187. The suit was for forfeiture of merchandise allegedly imported without proper payment of duties, and the paper in issue was an invoice for the merchandise. The invoice was a paper prepared by a third party, and thus contained no communication or assertion by the party to whom the notice was addressed. It was, however, owned and possessed by that party, its contents did tend to incriminate, and its production probably required cooperative participation. Justice Bradley's opinion of the Court, a mixture of fourth and fifth amendment reasoning, held that the statute violated both amendments. Justice Miller, concurring, analogized the notice to a subpoena duces tecum and urged that only the fifth and not the fourth amendment was violated. As the authorities cited in Judge Aldisert's footnote 10 make clear, Justice Miller's analysis rather than that of Justice Bradley, has better stood the test of time. But the fifth amendment holding in *Boyd* was unanimous.

It was clear in *Boyd* that no evidentiary use was to be made of the party's possession of the invoice. The only use was the evdientiary value of the contents of the invoice for the truth of the matter asserted—value of the goods—by a third party. Thus *Boyd* must be read as authority for at least McNaughton's second category. That is, *Boyd* interpreted the fifth amendment as prohibiting any self-incriminating disclosure involving cooperative participation. But so broad a holding has not survived. Perhaps the clearest rejection of the cooperative participation test is in Justice Brennan's opinion in *Schmerber v. California,* 384 U. S. 757, 761 (1966), where the Court declared:

> "We hold that the privilege [against self-incrimination] protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a *testimonial or communicative nature,*[5] and that the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to these ends.

5. A dissent suggests that the report of the blood test was 'testimonial' or 'communicative,' because the test was performed in order to obtain the testimony of others, communicating to the jury facts about petitioner's condition. Of course, all evidence received in court is 'testimonial' or 'communicative' if these words are thus used. But the Fifth Amendment relates only to acts on the part of the person to whom the privilege applies, and we use these words subject to the same limitations. A nod or head-shake is as much a 'testimonial' or 'communicative' act in this sense as are spoken words. But the terms as we use them do not apply to evidence of acts noncommunicative in nature as to the person asserting the privilege, even though, as here, such acts are compelled to obtain the testimony of others." (Emphasis added.)

Thus what seems to be left is McNaughton's first category —self-incriminating disclosures that are testimonial in a communicative or an assertive sense. Three separate possible forms of communication may be involved with a subpoena duces tecum. One is the communication involved in the identification or authentication of the document. A second is the communication involved in acknowledging the fact of possession. The third is the communication involved in the contents of the document. In this case, the government has not asked for and does not need testimony from Mr. Goldsmith in order to authenticate the papers. Even if they were in Goldsmith's possession his mere production of them would not authenticate them and the government could use another witness for that purpose. Goldsmith's production of the papers in response to a subpoena duces tecum would not require any testimony on his part. *Shapiro v. United States,* 335 U. S. 1, 27 (1957); *Wilson v. United States,* 221 U. S. 361, 372 (1911). I make this point because Judge Aldisert's opinion, by properly emphasizing Goldsmith's lack of possession in this case and confining its discussion to that factual complex, might be misunderstood as suggesting that had papers belonging to the accountant been in Goldsmith's possession they could not have been subpoenaed. Justice Bradley's opinion in *Boyd v. United States, supra,* would suggest that result, but the *Boyd* holding to that effect has long since been repudiated. The issue is not presented in this case. *Wilson v. United States, supra* and *United States v. White,* 322 U. S. 694 (1944) make clear that the involuntary surrender of papers rightfully possessed, pursuant to a subpoena duces tecum, is not within the privilege. As the majority opinion makes clear, *Couch v. United States,* 409 U. S. 322 (1973) rejects ownership of the papers as a test. Obviously ownership does not bear upon compelled communication. What remains, I suggest, is the test announced by Justice Brennan in *Schmerber v. California, supra*—compulsion of evidence of a testimonial or communicative nature. It would seem, then, that for fifth amendment purposes a subpoena duces tecum should be enforced even for papers owned and possessed by the wit-

ness so long as (1) the fact of his possession was not of evidentiary significance or his production was not used for that evidentiary purpose, (2) their mere production did not require his testimony, and (3) they could be authenticated through some other witness. *But see United States v. Austin-Bagley Corp.*, 31 F. 2d 229 (2d Cir.), *cert. denied*, 279 U. S. 863 (1929) holding that a custodian could be compelled to authenticate records which incriminated him. In the light of *Schmerber* and *Couch* I question whether *Austin-Bagley* is authoritative today. Neither the issue of mere production of papers owned by the witness nor the issue of testimonial authentication of papers in the witness's possession is decided by this case. Nor do we reach the issue of production of papers containing entries made by the witness and thus reflecting his communications made at a prior time.

HUNTER, *Circuit Judge*, concurring in part and dissenting in part:

I concur in Part I but dissent from Part II of the majority opinion. My concern is two-fold: 1) the majority misreads, in my view, the import of the Supreme Court's decision in *Couch*, and 2) I fail to understand the rationale by which the majority reaches its decision. The majority states:

> "If ownership *vel non* were the test of the scope of the Fifth Amendment privilege, our analysis would be at an end. But such is not the test, for the Fifth Amendment privilege focuses on personal compulsion upon the person asserting it. Possession, not ownership, 'bears the closest relationship to the personal compulsion forbidden by the Fifth Amendment.' Couch

> v. United States, *supra*, 409 U. S. at 331." Majority opinion at 13.

The majority also concedes that in certain situations a person may divest himself of actual possession, but yet retain constructive possession so as to leave the personal compulsions upon the accused substantially intact. *Couch v. United States*, 409 U. S. 333-35 (1973). Thus possession (either *actual or constructive*), not ownership, bears the most significant relationship to the fifth amendment protections.

The majority's recognition of these governing principles is unassailable and to this extent I am in complete agreement. I would add further, however, that *Couch* noted that "[i]t is extortion of information from the accused himself that offends our sense of justice." "As Mr. Justice Holmes put it: 'A party is privileged from *producing* the evidence but not from its production.'" 409 U. S. at 328 (emphasis added). The fifth amendment forbids "[i]nquisitorial pressure or *coercion* against a potentially accused person, compelling her, against her will, to utter self-condemning words *or produce incriminating documents.*" 409 U. S. at 329 (emphasis added). The incrimination comes from being forced "to *produce* and *authenticate* any personal documents or effects that might incriminate" you. *United States v. White*, 322 U. S. 694, 698 (1944), cited with approval in *Couch, supra*, 409 U. S. at 330 (emphasis added).

Couch therefore reaffirmed the previously accepted view of the Supreme Court that "[w]hat is incriminating about the production of a document in response to an order is not its contents, as one might have thought, but the implicit authentication that the document is the one named in the order." 409 U. S. at 348 (Marshall, J., dissenting).[1]

1. In his dissent, Justice Marshall summarized the accepted view of self-incrimination as pertaining to the compulsory production of documents (although he did not agree with this view).

With these principles in mind, I turn to the following statement by the majority, with which I am in full agreement:

> "To be successful with [their argument] appellants must convince us of the validity of two propositions: First, if the Goldsmiths had not given the 'analyses' to Fisher, they could have successfully resisted the summons because the documents sought would have been in a rightful personally privileged possession, and second, the Goldsmiths should not be held to have lost their privilege solely because they surrendered actual possession to Fisher for the purpose of obtaining legal advice in connection with the investigation."

I believe both questions should be answered in the affirmative.

I.

The Goldsmiths could have successfully asserted the fifth amendment while the "analyses" were in their actual possession.

In my view the majority obscures this issue by dismissing Goldsmiths' actual possession as "fleeting and transitory, limited to the act of delivery from the accountant's office to the office of their lawyer at his request." Besides being misleading,[2] this statement is irrelevant. Nowhere in

1. (Cont'd.)

See also Douglas, J., dissenting, who stated,

> "I can see no basis in the majority opinion, however, for stopping short of condemning only those intrusions resting on compulsory process against the author of the thoughts or documents." 409 U. S. at 341.

2. Goldsmith obtained the "analyses" from Berson in early August of 1971 (Berson estimated the date to be "[t]he 4th or 5th of August") and turned them over to Fisher on August 17, 1971. The record therefore simply does not support the majority's statement.

Couch did the Supreme Court suggest that the personal compulsion prohibited by the fifth amendment is dissipated whenever actual possession has been brief. If a subpoena had been served on the Goldsmiths while they were in actual possession of the documents, I fail to understand how the personal compulsion, which is the essence of the fifth amendment prohibition, can vary depending on the length of time the documents had previously been in Goldsmiths' actual possession.

Couch suggested that what is significant is not length of possession, but the quality of possession, *i.e.*, rightful possession in a purely personal capacity. The majority's concern that actual possession was allegedly "fleeting and transitory" is misplaced. These and other similar adjectives were referred to in *Couch solely* with respect to the constructive possession issue, *i.e.*, whether, *inter alia*, the divestment of actual possession (not the length of actual possession) is so "fleeting" or so "temporary and insignificant" that constructive possession is retained.

More relevant is the recognition by *Couch* that while *Boyd* did not "*address or contemplate* the divergence of ownership and possession," 409 U. S. at 330, the subsequent Supreme Corut decision in *United States v. White*[3] did address this issue:

> "[T]he papers and effects which the privilege protects must be the private property of the person claiming the privilege, or *at least in his possession in a purely personal capacity.*" 322 U. S. at 330 n. 10 (*Couch's* emphasis).[4]

3. 322 U. S. 694 (1944). *White* involved a union official who, having *possession* or *union records*, refused to honor a subpoena for their production on the grounds that they would incriminate him. The Supreme Court in *White* rejected this argument because the union official possessed the records is only an agency capacity.

4. *Couch's* emphasis of this language in *White* is particularly significant in view of several statements by the majority which sug-

Thus, the Supreme Court in *White* clearly suggested that something short of "private property" may be sufficient to invoke the fifth amendment. *Couch* not only approved this language in *White,* but also, as if to make its position unquestionably clear, cited with approval the Ninth Circuit decision in *United States v. Cohen:*

> "See also *United States v. Cohen,* 388 F. 2d 464, 468 (CA9 1967), where the court, in upholding the right of a possesor, non-owner, to assert the privilege, noted that 'it is possession of papers sought by the government, not ownership, which sets the stage for exercise of the governmental compulsion which it is the purpose of the privilege to prohibit.' Though the instant case concerns the scope of the privilege for an owner, nonpossessor, the Ninth Circuit's linkage of possession to the purposes served by the privilege was appropriate.
>
> "We do not, of course, decide what qualifies as rightful possession enabling the possessor to assert the privilege." 409 U. S. at 330 n. 12.

In *Cohen,* ownership and possession diverged just as in *White.* Only in *Cohen,* unlike *White,* there was possession in a "purely personal capacity."[5] The taxpayers' refusal to produce the records was upheld in fifth amendment grounds. Thus, except for the constructive possession issue, *Cohen* is virtually identical to the case before us.

In view of the Supreme Court's emphasis on possession as most relevant to the question of compulsion, I can-

4. (Cont'd.)
gests its reluctance to grapple with the italicized language in the text. *See infra.*

5. In *Cohen* a subpoena had been served on the taxpayer who was in possession of workpapers owned by his accounant.

not believe that we should disregard *Couch's* discussion of *White* and *Cohen.* It is difficult for me to understand, in view of the many courts which have wrestled with this problem, why the Supreme Court would choose to single out this language in *Cohen,* if it disagreed so completely with the Ninth Circuit's application of these principles. Yet, this is seemingly what the majority must conclude.[6]

It is my view therefore that the approach taken by the Ninth Circuit in *Cohen* has been explicitly approved by *Couch* and comports fully with the fifth amendment view embraced by the Supreme Court, *i.e.,* that possession, not ownership, is the significant factor and that the privilege protects one from having *to produce* the evidence, though not from its production.

Since the majority apparently does not dispute that the Goldsmiths had actual possession in a *purely personal capacity,*[7] the one question which remains unclear is whether the Goldsmiths had rightful possession. The lower court as I read its opinion, found it unnecessary to decide whether the Goldsmiths had been in "rightful" possession because of its reading of *United States v. Egenberg,* 443 F. 2d 512

6. Of course, if the majority finds there is no constructive possession, the *Cohen* question need not be reached. The majority, however, apparently professes to reach the *Cohen* question first:

> "[t]he claim to the Fifth Amendment privilege must emanate from the taxpayer's rights. And in the attorney-client relationships, the rights must flow upward from the taxpayer; not downward from the attorney."

I agree with this statement only on the sense that constructive possession cannot be found unless there first is rightful actual possession in a purely personal capacity.

7. It is undisputed that the "analyses" were prepared for the Goldsmiths from their own records and papers and pertained to their own business affairs. They obtained the "analyses" from Berson for their own personal purposes and did not hold them in furtherance of any objective of Berson, or as agent of Berson.

(3d Cir. 1971).[7a] While the question of "rightful" possession involves a conclusion of law, I would not deem it appropriate to draw a conclusion on this score from the limited factual findings below. As the Court in *Cohen* indicated, it is one thing for an accountant to relay to his client the existence of a demand of the government and to say, in effect, "I will produce them if you have no objection and will return them." It is quite another thing for an accountant to say "I want to produce them and demand their return." Yet either situation would be consistent with the facts found by the district court in this case. Accordingly, unless it can be said that the transference of the "analyses" to attorney Fisher bars the assertion of the Goldsmiths' fifth amendment privilege, I would remand to permit the lower court, with or without additional testimony at its discretion, to make additional findings of fact and conclusions of law.

II.

Notwithstanding the transference of the "analyses" to their attorney, the Goldsmiths retained constructive possession enabling them to assert their fifth amendment privilege.

The Supreme Court in *Couch* expressly rejected a *per se* rule that ony actual posession would enable one to successfully assert the fifth amendment privilege.[8] The Court noted that "situations may arise where constructive possession is so clear or the relinquishment of possession is so temporary and insignificant as to leave the personal compulsions upon the accused substantially intact." 409 U. S. at 333.

7a. See note 20 *infra*.

8. 409 U. S. at 336 n. 20.

Neither in *Couch* nor in any other case called to our attention has the Supreme Court engaged in such an analysis in the context of an attorney-client relationship.[9] The lower federal courts which have considered the matter have reached varying results.[10] The government contends that the presence of such a relationship is irrelevant because appellants, at this stage, disavow any reliance on the attorney-client privilege. While this contention accurately reflects the position of appellants before us,[11] I am compelled to disagree with the government's conclusion. Where there was a temporary surrender of actual possession pursuant to an attorney-client relationship, the nature of that relationship is of crucial importance in determining what a

---

9. While standing alone it would be a slender reed, indeed, the court did make a comment in *Couch* which can be read to indicate a material difference between the accountant-client and the attorney-client relationship:

> "Technically the order to produce the records was directed to petitioner's attorney since, after the summons was served upon the accountant, he ignored it and surrendered the records to the attorney. But constitutional rights obviously *cannot be enlarged* by this kind of action. The rights and obligations of the parties became fixed when the summons was served, and the transfer did not alter them." 409 U. S. at 322, 329 n. 9 (1973) (emphasis added).

10. *Compare United States v. Judson*, 322 F. 2d 460 (9th Cir. 1963), *Colton v. United States*, 306 F. 2d 633 (2nd Cir. 1962) and *Application of House*, 144 F. Supp. 95 (N. D. Cal. 1956) *with United States v. White*, 477 F. 2d 757 (5th Cir. 1973) (dissenting opinion), *In re Fahey*, 300 F. 2d 383 (6th Cir. 1961) and *United States v. Boccato*, 175 F. Supp. 886 (D. N. J.) *appeal dismissed*, 274 F. 2d 860 (3d Cir. 1959).

11. It is conceded by appellants that the lawyer-client privilege is inapplicable here. The authorities would seem to support the proposition that a document prepared by a tax accountant from bank records prior to the creation of an attorney-client relationship and given thereafter by the client to his attorney is not within the scope of the privilege. *See, e.g., Bouscher v. United States*, 316 F. 2d 451 (8th Cir. 1963); *Sale v. United States*, 228 F. 2d 682 (8th Cir. 1956); *United States v. Kelly*, 311 F. Supp. 1216 (E. D. Pa. 1969).

citizen has relinquished by the transfer and what he has retained.[12]

In *Couch* the taxpayer had surrendered actual possession to her accountant in the regular course of a long term business relationship. The accountant was an independent contractor engaged to perform a service; the service was the preparation of tax returns. The purpose of the surrender involved public disclosure. Justice Powell's opinion stresses this fact and its consequences:

> "In Boyd, a pre-income tax case, the Court spoke of protection of privacy, 116 U. S. at 630, but there can be little expectation of privacy where records are handed to an accountant, knowing that mandatory disclosure of much of the information therein is required in an income tax return. What information is not disclosed is largely in the accountant's discretion, not petitioner's. Indeed, the accountant himself risks criminal prosecution if he knowingly assists in the preparation of a false return. 26 U. S. C. §7602(2). His own need for self-protection would often require the right to disclose the information given him."

In the case before us, the Goldsmiths surrendered the analyses to their attorney for the limited purpose of securing legal advice not with respect to the preparation of a tax return but rather with respect to a pending tax investigation.[13] The Goldsmiths' expectation was of cloistered

12. Justice Marshall, dissenting in *Couch,* stated:

"A transfer to a lawyer is protected, not simply because there is a recognized attorney-client privilege, but also because the ordinary expectation is that the lawyer will not further publicize what he has been given." 409 U. S. at 350.

13. Although the Goldsmiths have alleged on this appeal that they transferred the "analyses" for the limited purpose of securing legal advice with respect to the pending tax investigation (government does not dispute), the record is less specific. Although this

scrutiny and consultation, not of public disclosure. They had the unqualified right to immediate possession;[14] they had the unqualified right to command and Fisher had the unqualified duty to obey.[15] No disclosure or other disposition of the papers could properly be made by Fisher without the Goldsmiths' approval.[16] In short, the Goldsmiths did nothing more than temporarily relinquish physical possession.

The government conceded in oral argument that the Goldsmiths would have retained the right to assert the privilege if they had stayed in Fisher's office while he examined the papers in their presence or if they had insisted on his reviewing the papers in their home. I believe such distinctions ignore the realities of the relationship between a client and his attorney and are wholly unrelated to the purposes of the fifth amendment privilege.

---

13. (Cont'd.)

presents no problem for me, at the very most a remand for such a finding would be necessary.

14. The only qualification of this right of a client would appear to be an attorney's lien. No suggestion is made that this exception is applicable here.

15. One could predict with some confidence that these realities of control would not be ignored in a case where a subpoena had been served on a taxpayer and he resisted production on the ground that he had given the records sought to his attorney. *Cf. First National City Bank of N. Y. v. I. R. S.,* 271 F. 2d 616 (2nd Cir. 1959); *Hopson v. United States,* 79 F. 2d 302 (2d Cir. 1935); *United States v. Howard,* 360 F. 2d 373, 381 (3d Cir. 1966).

16. As Judge Ainsworth noted in his dissenting opinion in *United States v. White,* 477 F. 2d 757, 766 n. 6 (5th Cir. 1973):

> "The new ABA Code of Professional Responsibility in its Ethical Consideration 4-4 notes: 'The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his clients. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge.'"

I think this is demonstrated by the logic of Judge Jertberg, writing for the majority in *United States v. Judson,* 322 F. 2d 460 (9th Cir. 1963):

> "Clearly, if the taxpayer in this case . . . had been subpoenaed and directed to produce the documents in question, he could have properly refused. The government concedes this. But instead of closeting himself with his myriad tax data drawn up around him, the taxpayer retained counsel. Quite predictably, in the course of the ensuing attorney-client relationship the pertinent records were turned over to the attorney. The government would have us hold that the taxpayer walked into his attorney's office unquestionably shielded with the Amendment's protection, and walked out with something less.
>
> • • •
>
> "The government states that the evil which the Fifth Amendment sought to prevent is not present when the prosecution seeks evidence of A's guilt from B. But this argument ignores the realities of the relationship existing where B is A's attorney. An attorney is his client's advocate. His function is to raise all the just and meritorious defenses his client has. No other 'third party,' nor 'agent,' nor 'representative' stands in such a unique relationship between the accused and the judicial process as does his attorney. He is the only person besides the client himself who is permitted to prepare and conduct the defense of the matter under investigation. The attorney and his client are so identical with respect to the function of the evidence and to the proceedings which call for its production that any distinction is mere sophistry.
>
> • • •

> "The very nature of the tax laws requires taxpayers to rely upon attorneys, and requires attorneys to rely, in turn, upon documentary indicia of their clients' financial affairs. In light of these realities a very real danger would be created if we were to sustain the government's position. That danger was apparent to Judge Murphy in Application of House, supra, when he spoke of 'heavy penalties.'
>
> "The government has at its disposal inquisitorial powers and administrative procedures which it may invoke at its pleasure. If the government's position were sustained here, those powers could be utilized to stimulate a taxpayer's consultation with his attorney and the predictable transfer of his records. The government's powers could then be utilized to compel disclosure of those matters by the attorney whenever the taxpayer were not available to utter the magic words. In our judgment, the inherent power thus to compel indirectly an individual's self-incrimination is curbed by the Fifth Amendment as effectively as the power to compel the same result directly.[16a]

16a. *United States v. Judson,* 322 F. 2d 460, 466-68 (9th Cir. 1963). As Judge Jertberg also pointed out, the law has traditionally considered the client and his attorney as one in matters relating to the compulsory production of documents. As Professor Wigmore records:

> ". . . [*W*]*hen the client himself would be privileged* from protection of the document, * * * as exempt from self-incrimination, the attorney having possession of the document is not bound to produce. Such has invariably been the ruling . On the other hand, if the *client would be compellable* to produce . . . then the attorney is equally compellable, if the document is in his custody, to produce under the appropriate procedure." (Original emphasis). 8 Wigmore, Evidence § 2307 (McNaughton Rev. 1961).

See also Colton v. United States, 306 F. 2d 633, 639 (2nd Cir. 1962) and *Brody v. United States,* 243 F. 2d 378, 387 (1st Cir. 1957).

In my view, it is difficult to imagine a more compelling case of constructive possession where the personal compulsions upon the accused are left substantially intact.

III.

I am thus left with a perplexing question which continues to linger in my mind after reading the majority opinion: what is the rationale on which the majority bases its decision? As far as I can discern, the majority opinion neither concludes that the Goldsmiths were without rightful possession in a purely personal capacity nor concludes that the Goldsmiths were stripped of personal compulsions by the transference of the "analyses" to their attorney. While these are essentially the propositions which the majority initially suggests the appellants must sustain, the majority appears never to reach them.

As I read the majority, whether there was rightful possession in a purely personal capacity or whether the personal compulsions on the Goldsmiths were left intact notwithstanding the transference of the "analyses" are questions which need not be reached, if the documents possessed by the Goldsmiths did not "have the capacity of coming within the penumbra of the Boyd ['private book and papers'] rule."[17] The majority states:

> "Thus, if the taxpayers are to succeed in their effort, they must prove that their *brief experience* of actual possession for a *limited purpose* coupled with turning their accountant's records over to their attorney has the legal capacity to generate a subsequent right of constructive possession of *sufficient intensity to elevate those records into the required category of their 'private books and papers.'* We are unwilling to attribute

17. Majority opinion at 19.

> a Fifth Amendment protection to the accountant's work product based on such a *limited possession* by his client."[18]

If this is a statement of the holding in this case, I find it unhelpful and fear that it will create uncertainty for lower courts seeking to interpret it.

Does the majority hold that "personal compulsion," which they recognize is forbidden by the fifth amendment, is dissipated when actual possession is only "limited" or "brief"? Does the majority hold that what is significant for fifth amendment analysis is the Goldsmiths' intent, *i.e.*, the "limited purpose" for which they obtained the "analyses"? Does the majority hold that because the "analyses" were not protected by the privilege while in the possession of the accountant, the Goldsmiths' fifth amendment privilege was forever lost because they could no longer have reasonable expectations of privacy in the "analyses"? These questions have immense ramifications for purposes of fifth amendment analysis.

Lastly, as a constitutional standard, I find the following statement by the majority vague and obscure, as well as at variance with *Couch:*

> "possession of sufficient intensity to elevate those records into the required category of their 'private books and papers.' "

The majority initially recognizes that the privilege may apply where "books and papers" are "possessed" rightfully in a purely personal capacity.[19] *White, Couch* and *Cohen, supra,* support this view. Yet the majority appears unwilling to apply this rule, but rather reverts to the *Boyd*

18. Majority opinion at 20 (emphasis added).
19. Majority opinion at 14, 17.

standard. Not only do I disagree with this approach, but I find it subject to various interpretations.

If by stating that possession must be of "sufficient intensity" to elevate the "analyses" to the level of "private books and papers," the majority is requiring ownership of the "analyses," [20] I believe *Couch* has now clearly decreed otherwise.

If by "private" the majority is referring to the origin of the papers at issue, I believe its reliance on *Boyd* is misplaced. In *Boyd* the privilege was sustained with respect to business invoices prepared and previously published by a party other than the citizen asserting the privilege.[21]

If by "private," the majority is referring to "books and papers" in which a person has reasonable expectations of privacy, I again disagree. It is true *Couch* spoke of reasonable expectations of privacy, but it did so in a *fourth amendment* context solely with reference to whether the expectations of privacy accompanying the taxpayers' *transference of records* to his accountant were such that the taxpayer *retained constructive possession. Couch* did not suggest that expectations of privacy were relevant to the issue of whether "books and papers" are possessed rightfully in a purely personal capacity. Moreover, *Couch's* approval of *Cohen* supports this view. Lastly, it is far less evident to me, than the majority suggests with-

20. I note particularly that the majority reaffirms *United States v. Egenberg,* 443 F. 2d 512 (3d Cir. 1971), in a manner which may be read to suggest that *Egenberg's* "superior right" theory has survived *Couch* intact. If this is what the majority implies, I disagree. In my view *Couch* does not undercut the *result* in *Egenberg,* but only because *Egenberg* involved possession in an agency rather than personal capacity.

21. As the Supreme Court noted in *Wilson v. United States,* 221 U. S. 221, 378 (1911), "[w]here one's private documents would tend to incriminate him, the privilege exists although they were actually written by another person." *See* note 1 *supra* (excerpt from Justice Douglas' dissent in *Couch*).

out further elaborating, that there has been a "'shift in emphasis from property to privacy' in the [Supreme] Court's treatment of the Fifth Amendment in compelled production of documents." [22] If anything, *Couch* represents, in my view, a shift from ownership to possession. In any event, in the absence of a fourth amendment claim, it simply is not readily apparent to me how prior Supreme Court cases justify this engrafting of privacy principles onto the fifth amendment privilege which is a protection against personal compulsion.[23]

I therefore respectfully dissent and conclude with this observation from *Couch:*

> "The basic complaint of petitioner stems from the fact of divulgence of the possibly incriminating information, *not from* the manner in which or *the person from whom it was extracted.* Yet such divulgence, *where it did not coerce the accused herself,* is a necessary part of the process of law enforcement and tax investigation." [24]

The Supreme Court has recognized the need to obtain information in connection with tax investigations, *but within limits.* Once the government attempts to extract this information from the accused, the fifth amendment protections are violated. As the majority aptly warns, "[w]e must never wander from the principle that what the Fifth

22. Majority opinion at 17.

23. A careful reading of *Couch* reveals the distinction the Supreme Court maintained between the fourth and fifth amendment protections:

> "We hold today that no [1] Fourth or [2] Fifth Amendment claim can prevail where, as in this case, there exists [1] no legitimate expectation of privacy and [2] no semblance of governmental compulsion against the person of the accused." 409 U. S. 336.

24. 409 U. S. at 329 (emphasis added).

Amendment prohibits is compelled incrimination." And in my view, this compulsion remains substantially intact even though Goldsmiths transferred the "analyses" to their attorney for purposes of legal representation.

I would therefore vacate and remand for a determination whether the Goldsmiths had rightful possession.

APPENDIX C.

Internal Revenue Code of 1954, Section 7602.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

Supreme Court, U. S.
FILED
SEP 26 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974.

No. 74-18.

SOLOMON FISHER, MORRIS GOLDSMITH and SALLY GOLDSMITH,

Petitioners,

v.

UNITED STATES OF AMERICA and ALAN M. FELDMAN,

Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

WILLIAM T. COLEMAN, JR.,
RICHARD L. BAZELON,
2600 The Fidelity Building,
Philadelphia, Pa. 19109
Attorneys for Petitioners, Solomon Fisher, Morris Goldsmith and Sally Goldsmith.

Of Counsel:
DILWORTH, PAXSON, KALISH, LEVY & COLEMAN,
2600 The Fidelity Building,
Philadelphia, Pa. 19109

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

INDEX TO BRIEF.

	Page
SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI	1
APPENDIX A	A1

TABLE OF CITATIONS.

Cases:	Page
Couch v. United States, 409 U. S. 322	2, 3
United States v. Kasmir, No. 73-1973 (5th Cir., August 21, 1974)	1, 2, 3
United States v. White, 477 F. 2d 757 (1973), aff'd en banc, 487 F. 2d 1335, petition for cert. filed, 42 U. S. L. W. 3502 (U. S. Feb. 25, 1974) (No. 73-1308)	3
Constitution:	
U. S. Constitution, Fifth Amendment	1

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Petitioners submit this supplemental brief pursuant to Supreme Court Rule 24.5 to call the attention of this Court to a case recently decided by the United States Court of Appeals for the Fifth Circuit which is in *direct* conflict with the decision of the United States Court of Appeals for the Third Circuit in the present case. Petitioners have already pointed out that there are other cases in conflict with the Third Circuit's decision in the present case (Petition For Writ Of Certiorari, pages 9-10).

In *United States v. Kasmir,* No. 73-1973 (5th Cir., August 21, 1974),[1] the Government served an IRS summons on taxpayer's attorney directing him to produce certain accountant's work papers concerning taxpayer, retained copies of the taxpayer's income tax returns, and retained copies of reports and other correspondence between the accounting firm and taxpayer. Two days prior to service of the summons, two special agents had visited the taxpayer, at which time they gave him *Miranda* warnings and informed him that his tax returns for the years 1969, 1970 and 1971 were under investigation. The next day, and one day before the summons was served, the accountant gave the documents described in the summons to the taxpayer, and within minutes the taxpayer had turned these documents over to his attorney.

The Court of Appeals for the Fifth Circuit held that the Fifth Amendment prevented compelled production of these documents, and that the Fifth Amendment rights of

1. The Opinion of the Fifth Circuit is printed as Appendix A hereto, *infra* pages A1 to A22.

the taxpayer could be asserted by the taxpayer's attorney (the taxpayer had not intervened in the proceeding in the District Court). The Fifth Circuit reasoned that under *Couch v. United States,* 409 U. S. 322, the taxpayer could not have been compelled to produce these documents if they were in his possession, and that the taxpayer's rights under the Fifth Amendment could not be decreased or defeated by the taxpayer's transfer of records to his attorney pursuant to the attorney-client relationship (see page A14, *infra*).

A comparison of *Kasmir* to the present case reveals that the Fifth Circuit and Third Circuit are in direct conflict. The IRS summons in both cases includes papers prepared by an accountant concerning the financial affairs of the taxpayer. In both cases the documents were given by the accountant to the taxpayer and by the taxpayer to his attorney, and in both cases these changes of possession took place after the taxpayer learned he was under investigation but before issuance of the summons. In both cases the transfer from the taxpayer to attorney was made pursuant to the attorney-client relationship, while the taxpayer was under investigation by the Intelligence Division of IRS.

Such differences as do exist between *Kasmir* and the present case make the present case stronger for the taxpayers. The period of possession by the taxpayers and by their attorney prior to service of the summons are substantially greater in the present case, where the taxpayers had the documents for approximately thirteen days and the attorney for approximately three and a half months before the summons was issued or served. In addition, in the present case there is a history of the type of papers sought by the Government being regularly turned over by the accountant to the taxpayers for the taxpayers' permanent

possession several years after such papers were prepared. There is no indication in the opinion of the Fifth Circuit of such a history in *Kasmir.* There is also no question in the present case concerning standing to assert the Fifth Amendment rights of taxpayers, as taxpayers in the present case intervened in the District Court and, along with their attorney, were appellants before the Court of Appeals and are petitioners before this Court.

The only other IRS summons enforcement case decided by the United States Courts of Appeals following this Court's decision in *Couch v. United States, supra,* is *United States v. White,* 477 F. 2d 757 (1973), *aff'd en banc,* 487 F. 2d 1335, *petition for cert. filed,* 42 U. S. L. W. 3502 (U. S. Feb. 25, 1974) (No. 73-1308), which was also before the Fifth Circuit. In that case, the Fifth Circuit held that the attorney on whom the summons was served was required to produce documents prepared by an accountant concerning the taxpayers. In *Kasmir,* the Fifth Circuit distinguished this earlier holding in *White* on the grounds that in *White* the documents had been transferred directly from the accountant to the attorney without any possession by the taxpayers and without any evidence that the transfer had taken place on the taxpayers' instructions or even with the taxpayers' knowledge (see pages A16-A17, *infra*). In the present case there is no question that the taxpayers had actual possession and that they transferred the documents to their attorney pursuant to the attorney-client relationship (Petition for Writ of Certiorari, page 5).

Thus, there is a direct conflict in the two circuits that have attempted to apply this Court's reasoning in *Couch v. United States, supra,* to the frequently recurring situation in which documents prepared by an accountant are turned over by the accountant to the taxpayer, and then from the

taxpayer to his attorney pursuant to the attorney-client relationship.

Respectfully submitted,

WILLIAM T. COLEMAN, JR.,
RICHARD L. BAZELON,
2600 The Fidelity Building,
Philadelphia, Pa. 19109
Attorneys for Petitioners.

Of Counsel:
DILWORTH, PAXSON, KALISH,
LEVY & COLEMAN,
2600 The Fidelity Building,
Philadelphia, Pa. 19109

APPENDIX A.

UNITED STATES OF AMERICA AND JAMES S. MABREY,
SPECIAL AGENT OF THE INTERNAL REVENUE SERVICE,
Plaintiffs-Appellees,

v.

C. D. KASMIR AND JERRY A. CANDY,
Defendants-Appellants.

No. 73-1973.

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

Aug. 21, 1974.

Appeal from the United States District Court for the Northern District of Texas.

Before BELL, THORNBERRY and DYER, Circuit Judges.
THORNBERRY, *Circuit Judge:*

In United States v. White, 5th Cir. 1973, 477 F. 2d 757, aff'd en banc, 487 F. 2d 1335, we phrased the issue presented thusly:

> . . . whether the constitutional privilege against compulsory self-incrimination may be invoked in behalf of a taxpayer by his attorney to prevent the production of income tax workpapers in his attorney's possession . . .

That same issue is before us again, this time with a different factual background.

On January 3, 1973, the taxpayer, Dr. Mason, was visited in his office in Dallas, Texas, by two Special Agents of the Internal Revenue Service who informed Dr. Mason that his tax returns for the years 1969, 1970, and 1971 were under investigation and gave him *Miranda* warnings. During the visit, one of the Special Agents asked to see Dr. Mason's personal books and records. Dr. Mason complied with the request, but at the same time, he called his accountant Candy, who advised him not to show any of his records to the Agents. The doctor followed Candy's advice, withdrew the records on the desk, and concluded the interview.

Following Dr. Mason's call to Candy, Candy called Kasmir and informed him of the visit. At Candy's request, Kasmir called Dr. Mason that afternoon and was retained by the doctor as his attorney. Early the next morning, at the direction of his employer, Candy delivered an assortment of records and documents to Dr. Mason at the doctor's office, and simultaneously relinquished to the taxpayer "the rightful, indefinite and legitimate possession of" the materials. Within minutes of receiving the materials, the taxpayer turned them over to appellant Kasmir as his attorney.

The next day summonses were served on Candy and Kasmir, ordering the latter to give up the documents and the former to give testimony concerning them.[1] When

1. The following documents were summoned:

1. Accountant's work papers pertaining to Dr. Mason's books and records of 1969, 1970, and 1971.

2. Retained copies of Dr. Mason's income tax returns for 1969, 1970, and 1971.

3. Retained copies of reports and other correspondence between [the accounting firm] and Dr. Mason during 1969, 1970, and 1971. (continued on next page)

neither appellant agreed to comply with the summonses, the government sought enforcement. In a pre-*White* and pre-*Couch v. United States* hearing and order, the district court granted the government's petition on the grounds that the records were owned by the accounting firm and that at the time the summonses were served, the records were in Kasmir's possession. The district court stayed its order pending this appeal.

Appellants contend that in the circumstances of this case, (1) the taxpayer's attorney has standing to raise the taxpayer's constitutional right to be free from self-incrimination, (2) enforcement of the summons for the production of records violates the taxpayer's Self-Incrimination

1. (Cont'd.)

The government did not seek the documents which Dr. Mason permitted the Agents to examine during their initial visit and admitted that those documents could be withheld by the doctor if he invoked a Fifth Amendment self-incrimination claim.
The summons was issued pursuant to 26 U. S. C. § 7602 (1964 ed.), which provides:

> Examination of Books and Witnesses.
>
> For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—
>
> (1) to examine any books, papers, records, or other data which may be relevant or material to such inquiry;
>
> (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and
>
> (3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

Privilege, and (3) enforcement of the summons for production of records should be denied because IRS agents materially misrepresented themselves before the taxpayer.

Following the procedure employed in *White,* we begin with appellants' second contention, for recognition of standing in the attorney would be of little comfort to appellants unless the attorney's client does have Fifth Amendment rights in the summoned materials. Appellants contend here, as the appellant did in *White,* that enforcement of the summons violates the taxpayer's privilege because possession of the records by the taxpayer's attorney constitutes constructive possession by the taxpayer. Initially faced with our en banc decision in *White* as a formidable wall to scale, appellants have launched a methodical effort in order to disabuse us of the notion that *White* compels their defeat. They argue that the taxpayer doctor's actual possession of the summoned documents is a crucial factual distinction between this case and *White.* They see further significance in the fact that here the taxpayer turned the papers over to his attorney pursuant to their attorney-client relationship while in *White* the transfer of the documents was not from the client to the attorney but from the taxpayers' accountant to the attorney. Both parties agree that the question before this court is whether those factual differences warrant a result different from that reached in *White.*

The government attacks the appellants' position from two sides. First, the government argues that an accused may not object to summons of records owned by third parties even if in the accused's possession. The government's theory is that an accused cannot invoke the Fifth Amendment privilege against self-incrimination unless he both owns and possesses the documents in question. Second, the government contends that the taxpayer never had

"rightful possession" of the papers because this enterprise by the appellants and the taxpayer was "a frantic last minute effort to put the requested records beyond the reach of a legitimate tax investigation" by "winning a footrace with agents of the government."

In the theatre of criminal tax investigations, few issues have been more hotly contested than the determination of the scope of the Fifth Amendment privilege against self-incrimination. Drawing heavily upon the historical evolution of the privilege, the Supreme Court in Couch v. United States, 1973, 409 U. S. 322, 93 S. Ct. 611, 34 L. Ed. 2d 548, has now spoken on the subject before us in a manner that guides our journey far down the road to judgment, but not to the very end. Lillian Couch was the sole proprietress of a restaurant who, since 1955, had given all of her financial records to an independent accountant for the purpose of preparing her income tax returns, although she retained title to the records. After a summons had been issued and served upon the account, the taxpayer instructed the accountant to deliver all of the sought-after documents directly to her attorney. In upholding enforcement of the summons against the accountant, the Supreme Court held that the taxpayer had no Fifth Amendment privilege in documents which she merely owned, which had been in the continuous possession of an independent accountant for over a decade, and with respect to which she could show no legitimate expectation of privacy.

The Court began its inquiry by quoting from Murphy v. Waterfront Comm'n of New York Harbor, 1964, 378 U. S. 52, 84 S. Ct. 1594, 12 L. Ed. 2d 678, on the nature of the Self-Incrimination Privilege and the interests it was designed to protect. Writing for the Court in *Murphy,* Justice Goldberg offered this statement:

> . . . It [the privilege] reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load," 8 Wigmore, Evidence (McNaughton rev., 1961), 317; our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life," United States v. Grunewald, 2 Cir., 233 F. 2d 556, 581-582 (Frank J., dissenting), rev'd 353 U. S. 391, 77 S. Ct. 963, 1 L. Ed. 2d 931; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent." Quinn v. United States, 349 U. S. 155, 162, 75 S. Ct. 668, 673, 99 L. Ed. 964.

Id., 378 U. S. at 55, 84 S. Ct. at 1596-1597.

The *Couch* Court held that actual possession, rather than ownership, "bears the most significant relationship to Fifth Amendment protections against state compulsions upon the individual accused of crime." Couch v. United States, supra, 409 U. S. at 333, 93 S. Ct. at 618. But the Court was careful to note that "actual possession" is not necessarily the *sine qua non* for successful assertion of the Fifth Amendment privilege:

> . . . Yet situations may well arise where constructive possession is so clear or the relinquishment of possession is so temporary and insignificant as to leave the personal compulsions upon the accused substantially intact. . . .

Id. The Court explained further:

> . . . We do indeed attach constitutional importance to possession, but only because of its close relationship to those personal compulsions and intrusions which the Fifth Amendment forbids . . . [W]e do not adopt any *per se* rule. We also decline to conjecture broadly on the significance of possession in cases and circumstances not before this Court . . .

Id., 409 U. S. at 336, 93 S. Ct. at 620 n. 20.

As a positive indication that lack of physical possession is not necessarily determinative, the Court did not stop with its conclusion that the papers were in the possession of the accountant, not the taxpayer, at the time the summons was served, but inquired further into the nature of the records sought by the summons and concluded that the taxpayer could show no legitimate expectation of privacy with regard to them because

> . . . there can be little expectation of privacy where records are handed to an accountant, knowing that mandatory disclosure of much of the information therein is required in an income tax return. What information is not disclosed is largely in the accountant's discretion, not petitioner's. Indeed, the accountant himself risks criminal prosecution if he knowingly assists in the preparation of a false return. . . . His own need for self-protection would often require the right to disclose the information given him. Petitioner seeks extensions of constitutional protections against

> self-incrimination in the very situation where obligations of disclosure exist and under a system largely dependent upon honest self-reporting even to survive. Accordingly, petitioner here cannot reasonably claim, . . ., an expectation of protected privacy or confidentiality.

Id., 409 S. Ct. at 335, 93 S. Ct. at 619, 34 L. Ed. 2d at 558.

Thus the method adopted by the Court focuses the inquiry on two factors: (1) the party in possession of the evidence and (2) where the actual possessor is not the taxpayer, the taxpayer's legitimate expectation of privacy with regard to the evidence. By considering not only the question of physical, personal compulsion upon the accused, but also any expectation of privacy which might reasonably attach to the summoned materials, the Court was weighing the extent to which any of the variety of policies enumerated in *Murphy* would be furthered by application of the privilege. Indeed, in *Murphy,* the Court noted that "it will not do . . . to assign one isolated policy to the privilege," and on that basis to decide whether applying the privilege is in furtherance of "the" policy. Murphy v. Waterfront Comm'n of New York Harbor, supra, 378 U. S. at 56 n. 5, 84 S. Ct. at 1597 n. 5.

We had our first opportunity to apply the lesson of *Couch* only recently in United States v. White, supra, 477 F. 2d 757, aff'd en banc, 487 F. 2d 1335. After an IRS investigation had commenced but prior to the issuance of a summons, the taxpayers' accountant had turned over workpapers and other documents directly to the taxpayers' attorney White. A year later, a summons was served upon the attorney who resisted enforcement by asserting his client taxpayers' Fifth Amendment privilege. Since the taxpayers were obviously not in actual possession of the requested material, their only hope lay in their contention that they were in constructive possession through their attorney. Although the high court did not attempt to define that term in *Couch,* in writing for this court in *White,* Judge Gewin attempted to explicate the Supreme Court's thinking:

> . . . As possible examples of such a case the Court cited Schwimmer v. United States and United States v. Guterma. In both of these cases a claim of privilege was successfully asserted to prevent the government from obtaining documents the parties had temporarily stored on the premises of corporations. The reference to these cases in *Couch* indicates that a claim of privilege might be valid on the constructive possession theory if the taxpayer has placed papers in the hands of another person or entity for custodial safekeeping, thereby retaining the right to immediate possession though not having actual possession . . .

United States v. White, supra, 477 F. 2d at 763. Unfortunately for the taxpayers in *White,* they could not fall within that definition. The taxpayers had never been in actual possession of the papers sought by the government. The attorney had obtained the documents directly from the accountant without record evidence that he had done so upon the taxpayers' instructions or that they were even aware that he had secured them. The parties to the transfer, White and the accountant, had agreed that White—not the taxpayers—could keep the papers indefinitely, but that they would be returned to the accountant upon completion of White's work. Thus, the taxpayers retained no right to immediate possession; indeed they "retained" nothing. Their actions could not be said to have evinced any legitimate expectation of privacy. Under those circumstances, to have permitted the attorney to assert the taxpayers'

privilege would have been inconsistent with the nature of the right against self-incrimination and with the interests it was designed to protect.

It is with this lengthy prelude that we finally meet appellants' and the government's contentions head-on. Our reading of *Couch* convinces us that there is no basis for adopting the government's position that ownership is a prerequisite to the assertion of the privilege. Indeed, the Court eschewed any reliance on ownership as an important factor. "To tie the privilege . . . to a concept of ownership would be to draw a meaningless line." Couch v. United States, supra, 409 U. S. at 331, 93 S. Ct. at 617. To agree with the government here would be not only to read *Couch* perversely, but also to ignore the historical elaboration of the Fifth Amendment privilege. We choose instead to adhere to the test enunciated in *Couch,* a test which depends upon the policies and purposes of the privilege.[2]

The government's most appealing argument is that the taxpayer had no "rightful possession" here because this enterprise by the taxpayer, his accountant, and his attorney was "a frantic last minute effort to put the requested records beyond the reach of a legitimate tax investigation" by "winning a footrace with agents of the government." In spite of the argument's great superficial persuasiveness, we reject it.

In *Couch,* the Supreme Court refused to consider the fact that the documents sought were presently in the possession of the taxpayer's attorney because the transfer from accountant to attorney had occurred after the summons had been served on the accountant.

2. The ownership might be a relevant factor to consider in determining a taxpayer's legitimate expectation of privacy with respect to summoned materials not in his possession, although that factor would not be dispositive.

> . . . [C]onstitutional rights obviously cannot be enlarged by this kind of action. The rights and obligations of the parties became fixed when the summons was served, and the transfer did not alter them. . . .

Couch v. United States, supra, 409 U. S. at 329, 93 S. Ct. at 616 n. 9, 34 L. Ed. at 554. But in the present case, the transfer of records occurred before the summons had been served. Indeed, the summons was issued and served the day following the taxpayer's possession.

The government would have this court hold that the rights and obligations of the parties become fixed when the Special Agent makes his first appearance and confronts the taxpayer with the unwelcome news that he is under investigation for criminal violations of the tax laws. But there is no support for that position in *Couch;* on the contrary, the Court has already made a choice which indicates disapproval of the government's position.[3] *See* United States v. White, supra, 477 F. 2d at 762 n. 12.

We fully agree with the government that a post-summons transfer of the documents is to be ignored in the determination of the applicability of the Fifth Amendment privilege. *Couch* demands no less. But the corollary proposition is that while the appellants and the taxpayer have in fact attempted to put the requested records beyond the reach of a tax investigation, that action is wholly proper as long as the transfer occurs before the summons is served.

3. The only reported opinion which appears to adopt the government's position is United States v. Widelski, 6th Cir. 1971, 452 F. 2d 1, cert. denied, 1972, 406 U. S. 918, 92 S. Ct. 1769, 32 L. Ed. 2d 117. But that opinion is nowhere cited in *Couch.* Instead the Court cited United States v. Zakutansky, 7th Cir. 1968, 401 F. 2d 68, 72, cert. denied, 1969, 393 U. S. 1021, 89 S. Ct. 628, 21 L. Ed. 2d 565, and United States v. Lyons, 1st Cir. 1971, 442 F. 2d 1144, both of which held that constitutional rights may be enlarged by a transfer of records which occurs after a summons is served.

In our judgment, it would be highly improper and a serious derogation of the Fifth Amendment right if we were to test appellants' contention by asking whether they have attempted to keep evidence out of the hands of the investigators. For every successful claim of privilege frustrates to some extent the government's ability to gather evidence. In this context, the Fifth Amendment privilege demands that the government "shoulder the entire load" in its contest with the individual. Murphy v. Waterfront Comm'n of New York Harbor, supra; 8 Wigmore, Evidence (McNaughton rev., 1961) p. 317.

But more importantly, and regardless of the timing of the transfers, appellants could not put the records beyond the reach of the IRS unless the material were properly the subject of a Fifth Amendment claim.[4] In this regard, some categorical statements can be made. Following *Couch*, it is clear that the taxpayer could assert no Fifth Amendment privilege in the records while they were held by his accountant. It is likewise clear from *Couch* that at the time the taxpayer obtained actual possession of the records, the day before the summons was served, he was in the position to assert his Fifth Amendment privilege, if the summons had then been served. Had he at that point followed Judge Gewin's analysis and placed the materials in a safe under his control, he could have successfully invoked the privilege by relying upon his constructive possession. *See* Schwimmer v. United States, 8th Cir. 1956, 232 F. 2d 855; United States v. Guterma, 2nd Cir. 1959, 272 F. 2d 344. Instead the taxpayer transfers the materials to his attorney for safekeeping and for the preparation of his defense.

We are thus faced with this dilemma: If we hold that no Fifth Amendment privilege is now available, then the

4. The process for determining the incriminating character of evidence is plainly set forth in Hoffman v. United States, 1951, 341 U. S. 479, 71 S. Ct. 814, 95 L. Ed. 1118. But the incriminating character of the materials sought here has not been put in issue.

taxpayer's rights have been effectively decreased by his transfer. In a sense, the taxpayer is better off without an attorney to study the records than with him. Indeed, we make it almost appear as though the taxpayer must now closet himself with his myriad tax data drawn up around him and permit the attorney to study or possess the records only when the taxpayer is in a position to grab them physically, lest some furtive and surreptitious agent may swoop down with a summons while the attorney is fingering the treasure. On the other hand, if we hold that the Fifth Amendment privilege is available here, then we make it appear as if the applicability of the privilege is more a matter of the form of the transfer than the substance behind the privilege since the most important difference between this case and *White* is taxpayer's fleeting actual possession between that of the accountant and that of the attorney.

But even dilemmas sometimes admit of sensible resolution, and in any case, decide we must. To make the correct choice, we return to the principles announced in *Couch* and *White*. In its most distilled form, the question is whether the taxpayer has a sufficient legitimate expectation of privacy in the summoned records to warrant the label of constructive possession. Couch v. United States, supra, 409 U. S. at 334-338, 93 S. Ct. at 619-620.

Couch held that a taxpayer could claim no legitimate expectation of privacy in records which he left with an accountant for the purpose of preparing the taxpayer's personal income tax returns. When the taxpayer in the present case received the records from his accountant, the taxpayer's physical possession became the "private enclave" which the Fifth Amendment privilege was designed to protect. It makes no difference that the taxpayer could claim no legitimate expectation of privacy when the records were

held by the accountant, for it has not been suggested that a taxpayer in possession of records can be compelled to produce them because they have previously been used in preparing his own income tax return. For Fifth Amendment purposes, that the government can summon the documents from the accountant does not mean that those same documents can be summoned from the taxpayer. As the Ninth Circuit put it, "that the government might obtain these documents without compelling [the taxpayer] to incriminate himself is hardly a justification for compelling [the taxpayer] to incriminate himself." United States v. Cohen, 9th Cir. 1967, 388 F. 2d 464, 469; *see also* Silverthorne Lumber Co. v. United States, 1920, 251 U. S. 385, 392, 40 S. Ct. 182, 183, 64 L. Ed. 319.

When the taxpayer subsequently transferred his records to his attorney pursuant to the attorney-client relationship, in our judgment he retained that legitimate expectation of privacy or private enclave with respect to the records. We reject the notion, as we did in *White*, that a Fifth Amendment privilege in the taxpayer can somehow be *created* when evidence finds its way into his attorney's hands. *See also* Falsone v. United States, 5th Cir. 1953, 205 F. 2d 734, 738. But we also reject the idea that a taxpayer's right to be free from self-incrimination can be *decreased* or defeated by the taxpayer's transfer of records to his attorney pursuant to the attorney-client relationship.[5]

5. 8 Wigmore, Evidence (McNaughton rev., 1961) § 2307:

"Is the attorney compellable to *produce in court*, by subpoena or bill of discovery, the documents placed in his possession by the client?

* * *

"The answer here depends upon the other privileges of the client *irrespective of* [the attorney-client privilege]. The attorney is but the agent of the client to hold the deed. If the client is compellable to give up possession, then the attorney is; if the client is not, then the attorney is not. It is merely a question of

In *White*, in order to permit assertion of the privilege, we would have had to recognize that the transfer from the accountant to the attorney *created* a right in the taxpayer where none existed before. And in *Couch*, the taxpayer gave up the Amendment's protection when she gave her records to her accountant for the purpose of preparing tax returns and never regained the protection before the materials were summoned. Quite aside from the fact that the attorney in *Couch* came into possession of the records after the summons had been served and thus after all rights and obligations had vested, to have allowed assertion of the privilege there would have been to *create* rather than *retain* a privilege in the taxpayer. Neither the Supreme Court nor this court could approve such a result.

But where the taxpayer transfers potentially incriminating materials which he physically possesses to his attorney pursuant to an attorney-client relationship, the taxpayer's legitimate expectation of privacy with regard to the use of the materials should be quite different from his legiti-

5. (Cont'd.)

possession, and the attorney in this respect is like any other agent. There is, to be sure, the added consideration of policy—namely, that if the attorney were not compellable when the client was, then the client's obligation to produce could always be evaded in very simple fashion by placing the deed with the attorney.

* * *

"It follows, then, that *when the client himself would be privileged* from protection [sic] of the document . . . as exempt from self-incrimination, the attorney having possession of the document is not bound to produce. Such has invariably been the ruling. On the other hand, if the *client would be compellable* to produce . . . then the attorney is equally compellable, if the document is in his custody, to produce under the appropriate procedure." (Emphasis in original.)

See also United States v. Judson, 9th Cir. 1963, 322 F. 2d 460, 466: "The government would have us hold that the taxpayer walked into his attorney's office unquestionably shielded with the Amendment's protection, and walked out with something less."

mate expectations as to its use in the hands of an independent accountant preparing tax returns. While the accountant has a legal duty to disclose, the attorney has a strict, ethical obligation to prevent disclosure. This ethical obligation is broader than and independent of the attorney-client privilege,[6] which is admittedly not available here. The Disciplinary Rules of the Code of Professional Responsibility prepared by the American Bar Association absolutely forbid an attorney from knowingly revealing either a "confidence" or a "secret" of his client. A "confidence" refers to information protected by the attorney-client privilege while a "secret" refers to any other information "gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." ABA Code of Professional Responsibility, DR 4-101(A), (B)(1). Of course, the taxpayer cannot assert the attorney-client *relationship*, as distinguished from the attorney-client privilege, as a basis for denying enforcement of the summons. But even where there is no attorney-client *privilege* in certain material, as here, the taxpayer client may still have a legitimate expectation of privacy with regard to that material because of the attorney-client relationship, an expectation of privacy which helps to give substance to a Fifth Amendment privilege contention.

Stripped of any constitutional perspective, the factual differences between this case and *White* may seem insignificant. But we find constitutional significance both in the

6. The ABA Code of Professional Responsibility, Ethical Consideration 4-4 provides in part:

> "The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge."

actual possession by the taxpayer before the summons was served and in the transfer from the taxpayer to the attorney pursuant to the attorney-client relationship. We conclude that the taxpayer here retained a legitimate expectation of privacy with regard to the materials he placed in his attorney's custody, that he retained constructive possession of the evidence, and thus that he retained Fifth Amendment protection. As a matter of constitutional law, we can see no other way to resolve the apparent dilemma in a manner which is consistent with the nature of the right against self-incrimination and in furtherance of the interests it was designed to protect.

We are convinced that our result is consistent with the policies and purposes of the Self-Incrimination Privilege in spite of the government's contention that the taxpayer's evanescent possession is wholly inadequate to raise the privilege. If the taxpayer had possessed the papers for only one more day, when the summons was served, he could have successfully asserted the privilege. The government has not suggested a method by which we could distinguish the taxpayer's possession here from something more permanent. Nor has the government offered any reason why we should compel the taxpayer to hold onto the documents for a particular period of time. In our judgment, the taxpayer's short-lived possession was sufficient to permit a claim based on the Self-Incrimination Privilege, and the subsequent transfer to his attorney evidenced a sufficient legitimate expectation of privacy to permit the taxpayer to retain the Amendment's protection through constructive possession.

This does not end the matter, however, for we must now answer the question which we left unanswered in *White:* whether the taxpayer's attorney has standing to assert the taxpayer's claim of privilege. If he does not,

then the district court's order is to be affirmed, because the taxpayer has not intervened in his own behalf. Although there is no unanimity among the courts in their answers to the question posed, in our judgment the weight of authority and reason supports the position that an attorney may claim the Self-Incrimination Privilege on behalf of his client if his client could have successfully asserted such a privilege. United States v. Judson, 9th Cir. 1963, 322 F. 2d 460, 463-465; Colton v. United States, 2nd Cir. 1962, 306 F. 2d 633, 639, cert. denied, 1963, 371 U. S. 951, 83 S. Ct. 505, 9 L. Ed. 2d 499; Brody v. United States, 1st Cir. 1957, 243 F. 2d 378, 387 n. 5, cert. denied, 354 U. S. 923, 77 S. Ct. 1384, 1 L. Ed. 2d 1438; 8 Wigmore, Evidence § 2307 (McNaughton rev., 1961); Grant v. United States, 1913, 227 U. S. 74, 33 S. Ct. 190, 57 L. Ed. 423; Application of House, N. D. Cal. 1956, 144 F. Supp. 95; *but cf.*, Bouschor v. United States, 8th Cir. 1963, 316 F. 2d 451, 458-459. As the Ninth Circuit explained in United States v. Judson, supra, the realities of tax litigation require that the attorney be allowed to press his client's claim where the client could successfully do so:

> . . . No other "third party," nor "agent," nor "representative" stands in such a unique relationship between the accused and the judicial process as does his attorney. He is the only person besides the client himself who is permitted to prepare and conduct the defense of the matter under investigation. The attorney and his client are so identical with respect to the function of the evidence and to the proceedings which call for its production that any distinction is mere sophistry . . .

United States v. Judson, supra, 322 F. 2d at 467. While there may be good reason to permit the taxpayer to intervene and to encourage the taxpayer to do so, we see no reason to require that procedure.

Thus the IRS is not entitled to enforcement of the summons directed to attorney Kasmir for the production of documents. However, in light of *Couch*, the IRS is entitled to enforcement of the summons served upon accountant Candy for his testimony concerning the sought-after documents. Whether, as a practical matter, enforcement of this summons is of any benefit to the government in its investigation is purely a matter for the IRS to consider. As a constitutional matter, the accountant's testimony cannot offend the taxpayer's Self-Incrimination Privilege. Couch v. United States, supra.

The result which we reach here does not make us any less mindful of the overriding necessity of collecting the tax revenues. At the same time, we must also remember that the investigative power of the Internal Revenue Service is fundamentally inquisitorial, that the government's power lies not in the fashion of the Courts of the Star Chamber and the High Commission,[7] but in its ability to invade, in a civilized manner, the personality and privacy of every citizen in the United States.

When the Constitution was first ratified, the citizens of this country were not yet dependent upon atorneys to decipher complex tax laws. And at that time, the specter of the more brutal forms of compulsory self-incrimination was all that required concern. Today, however, the government's power can be used to stimulate a taxpayer's dependence upon his attorney and the predictable transfer of his records. Once so transferred, the government argues, the materials are subject to compelled disclosure. In our judgment, the inherent power thus to compel indirectly an

7. Whose only limitation was that whatever torture might be applied, it could not be such as to draw blood from the victim. Hence the popularity of the rack. *See* 40 Brooklyn L. Rev. 211, 213 n. 10 (1973); *see also* L. Lævy, Origins of the Fifth Amendment: The Right Against Self-Incrimination (1968).

individual's self-incrimination is curbed by the Fifth Amendment as effectively as the power to compel the same result directly. United States v. Judson, supra, 322 F. 2d at 468. The policies and purposes of the Self-Incrimination Privilege do not change merely because new techniques or devices for compulsion have replaced the old. Put another way, we must never forget that it is a constitution we are expounding. M'Culloch v. Maryland, 1819, 4 Wheat. 316, 407, 4 L. Ed. 579, 601.[8]

Affirmed in part, reversed in part.

BELL, *Circuit Judge* (dissenting):

I respectfully dissent.

The operative facts here are:

(1) The records sought to be produced are owned by the accountant and not taxpayer (the records had to do with taxpayer's tax returns). The government did not seek the production of records owned by taxpayer.

(2) When the taxpayer telephoned the accountant to say that the agents were in his office, the accountant advised taxpayer to say nothing and not to produce his records.

(3) The accountant then selected a lawyer for taxpayer, took the records in question (the accountant's records), to the taxpayer's office early the next morning, where he handed them to taxpayer who, in turn, handed them to the lawyer.

8. Because of our disposition of this appeal, we need not consider appellants' final contention.

I dissent for two reasons. First, taxpayer can take no comfort in the activity of the accountant and lawyer. Without venturing into a dissertation on situation ethics, I am satisfied to say that lawyers and accountants have a higher call to duty than that of acting to prevent the production of evidence through the use of a privilege under the circumstances here. The privilege is designed to protect a client's confidences imparted during the attorney-client relationship.

The privilege does not exist, however, for the purpose of being used initially and directly as a stratagem or device to place pre-existing documentary evidence beyond the reach of the law. While conceding this, the majority in the same breath uses the attorney-client relationship in a futile effort to establish an expectation of privacy to satisfy one of the requirements of Couch v. United States, 1973, 409 U. S. 322, 93 S. Ct. 611, 34 L. Ed. 2d 548.

In *Couch*, a taxpayer was not allowed the Fifth Amendment privilege against self-incrimination even as to her own records in the hands of her accountant. The court stated that the two essential bases for the privilege were absent: no legitimate expectation of personal privacy in the records, and no governmental compulsion against the person of the taxpayer.

Where is taxpayer's expectation of personal privacy in the accountant's records here? What compulsion is there against the person of the taxpayer in a summons against his lawyer to produce an accountant's records which were for a fleeting moment placed in the hands of the taxpayer by the accountant. An expectation of personal privacy of the *Couch* type cannot be generated *ipso facto* by creating a lawyer-client relationship. I would therefore pretermit further consideration of the element of compulsion.

Moreover, it would appear that the majority opinion may conflict with our decision in United States v. White, 5

Cir., 1973, 477 F. 2d 757, aff'd en banc, 487 F. 2d 1335. The only possible difference between this case and *White* is that the accountant's records in *White,* reflecting, as here, the affairs of the taxpayer, were transferred directly from the accountant to the lawyer. We held that there was no Fifth Amendment privilege to be exercised for the taxpayer by his lawyer in the accountant's records.

I did not join in *White* on the narrow basis of exalting form over substance to the extent of reserving a different holding for a set of facts where the same records had passed through the hands of the taxpayer.

For the reasons stated I would affirm the district court to the end of enforcing the summons.

e Court, U. S.
MAR 13 1975
MICHAEL RODAK, JR., CLERK

SINGLE APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-18

SOLOMON FISHER
and
MORRIS GOLDSMITH and SALLY GOLDSMITH,
Intervening Parties,

Petitioners

v.

UNITED STATES OF AMERICA and ALAN M. FELDMAN,
Special Agent, Internal Revenue Service,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR CERTIORARI FILED JULY 26, 1974
CERTIORARI GRANTED JANUARY 27, 1975

THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107

TABLE OF CONTENTS

	Page
Docket Entries	1a
Internal Revenue Summons To Solomon Fisher, Esquire, Issued December 1, 1971	4a
Petition To Enforce Internal Revenue Summons And Affidavit Of Special Agent Alan Feldman	6a
Order To Show Cause	11a
Answer To Petition To Enforce Internal Revenue Summons	12a
Amended Petition To Intervene	15a
Transcript Of Hearing Of March 3, 1972	17a
Internal Revenue Summons To Harold Berson, C.P.A., Issued October 22, 1971 (Ex. G-1 at hearing)	71a
Order Of United States District Court, March 8, 1972 Granting Intervention	73a
Proposed Findings Of Fact Of Respondents	74a
Memorandum And Order Of United States District Court, August 4, 1972	Petition For Certiorari, Appendix A
Order Of United States District Court, August 31, 1972	76a
Order Of United States District Court, September 29, 1972	77a
Opinion Of The United States Court Of Appeals For The Third Circuit, June 7, 1974	Petition For Certiorari, Appendix B

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975 No. 74-18

SOLOMON FISHER
and
MORRIS GOLDSMITH and SALLY GOLDSMITH,
Intervening Parties,
Petitioners

v.

UNITED STATES OF AMERICA and ALAN M. FELDMAN,
Special Agent, Internal Revenue Service,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

DOCKET ENTRIES

United States District Court for the Eastern District of Pennsylvania

February 2, 1972	Petition to enforce internal revenue summons and affidavit of Alan M. Feldman, filed.
February 8, 1972	Ordered 2/8/72 that Solomon Fisher appear in the U.S.D.C. on 3/3/72 at 10:30 A.M. to show cause why he

	should not be compelled to obey the Internal Revenue summons issued to him on 12/1/71, etc., filed. 2/9/72 entered and copy to U.S. Attorney.
February 11, 1972	Affidavit of Alan M. Feldman re service of Order dated 2/8/72 upon Solomon Fisher respondent, on 2/11/72, filed.
February 28, 1972	Respondent, Solomon Fisher's answer to petition to enforce internal revenue summons, filed.
March 2, 1972	Petition of Morris Goldsmith and Sally Goldsmith to intervene, filed.
March 2, 1972	Memorandum in support of petition to intervene of Morris Goldsmith and Sally Goldsmith, filed.
March 2, 1972	Government's memorandum in opposition to petition of Morris Goldsmith and Sally Goldsmith to intervene, filed.
March 3, 1972	Government's motion to quash subpoena duces tecum and memorandum in support of motion, filed.
March 3, 1972	HEARING re motion to produce documents: The Court grants motion of Morris and Sally Goldsmith to intervene as party defendants. Witnesses sworn. Motion to produce documents —C.A.V.
March 14, 1972	Order dated 3/8/72 that the amended petition to intervene is granted and Morris Goldsmith and Sally Goldsmith are parties to this proceeding, filed. 3/14/72 entered and copies mailed.

May 22, 1972	Transcript of 3/3/72 filed.
June 1, 1972	Government's brief, filed.
June 2, 1972	Defendants' proposed findings of fact, filed.
June 2, 1972	Defendants' memorandum, filed.
June 29, 1972	Government's Reply Brief filed.
June 30, 1972	Reply Brief of Respondents, filed.
August 7, 1972	Memorandum, DAVIS, J., and Order dated 8/4/72 that respondent appear before petitioner (within 30 days) at Room 752, 401 N. Broad St. and produce for inspection those items enumerated in the summons dated 12/1/71, filed. (8/8/72 entered and copies mailed)

. . . .

CHRONOLOGY

United States Court of Appeals for the Third Circuit

May 25, 1973	Argument before ALDISERT and HUNTER, Circuit Judges, and STAPLETON, District Judge.
April 10, 1974	Reargument before SEITZ, Chief Judge, and VAN DUSEN, ALDISERT, GIBBONS, ROSENN, HUNTER, WEIS, and GARTH, Circuit Judges.
June 7, 1974	Opinion filed.

CHRONOLOGY

Supreme Court of the United States

July 26, 1974	Petition For Writ Of Certiorari, filed.
January 27, 1975	Petition For Writ Of Certiorari granted. Case consolidated with *United States v. Kasmir*, No. 74-611.

Summons

Department of the Treasury
Internal Revenue Service

Intelligence Division
Post Office Box 12914
Phila., Pa. 19108
Phone: 597-2255

In the matter of the tax liability of
MORRIS GOLDSMITH
Internal Revenue District of Philadelphia
Period(s) 1969 and 1970

The Commissioner of Internal Revenue

To SOLOMON FISHER, ESQUIRE
AT 123 South Broad Street
Philadelphia, Pennsylvania

Greetings: You are hereby summoned and required to appear before ALAN M. FELDMAN, an officer of the Internal Revenue Service, to give testimony relating to the tax liability or the collection of the tax liability of the above named person for the period(s) designated and to bring with you and produce for examination the following books, records, and papers at the place and time hereinafter set forth:

1. Analysis of Receipts and Disbursements for MORRIS GOLDSMITH for 1969 and 1970.
2. Copies of Payroll Tax Returns for MORRIS GOLDSMITH for 1969 and 1970.
3. Analysis of Receipts and Disbursements for SALLY GOLDSMITH for 1969 and 1970.

The above-mentioned records were prepared by and are the property of HAROLD BERSON, C.P.A.

Place and time for appearance: at Room 752, Intelligence Division, 401 North Broad Street, Philadelphia, Pa. 19108 on the 13th day of December, 1971 at 10:00 o'clock A.M.

Failure to comply with this summons will render you liable to proceedings in the district court of the United States or before a United States commissioner or magistrate to enforce obedience to the requirements of this summons, and to punish default or disobedience.

Issued under authority of the Internal Revenue Code this 1st day of December, 1971.

ATTESTED COPY: Alan M. Feldman, Special Agent

(Certificate of Service Omitted in Printing)

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA and
ALAN M. FELDMAN, *Special Agent,*
Internal Revenue Service,
Petitioners

Misc. 72-18

v.

SOLOMON FISHER,
Respondent

PETITION TO ENFORCE INTERNAL REVENUE SUMMONS

Now come the United States of America and Special Agent Alan M. Feldman, Internal Revenue Service, by their attorney, Louis C. Bechtle, United States Attorney for the Eastern District of Pennsylvania, and respectfully show unto this Court as follows:

I

This is a proceeding brought under Sections 7402(b) and 7604(a) of the Internal Revenue Code of 1954, 26 U.S.C. §§7402(b) and 7604(a) (1964) to judicially enforce an Internal Revenue summons.

II

The petitioner, Alan M. Feldman, is a Special Agent of the Internal Revenue Service, employed in Philadelphia, Pennsylvania, and is authorized to issue Internal Revenue summonses under the authority of Section 7602 of the Internal Revenue Code of 1954, 26 U.S.C. §7602 (1964), and Treasury Regulations on Procedure and Administration §301. 7602-1, 26 C.F.R. §301. 7602-1 (TD 6421, October 23, 1959 and TD 6498, October 24, 1960).

III

The respondent, Solomon Fisher, is an attorney who maintains offices at 123 South Broad Street, Philadelphia, Pennsylvania.

IV

Petitioner, Special Agent Alan M. Feldman, Internal Revenue Service, has been participating in an investigation to determine the federal tax liabilities of Morris Goldsmith for the years 1969 and 1970.

V

The respondent, Solomon Fisher, is in possession and control of records, documents, papers and information relating to the tax liabilities of Morris Goldsmith for the years 1969 and 1970.

VI

On December 1, 1971, a summons, Treasury Form 2039, was issued by the petitioner, Alan M. Feldman, directing the respondent to appear before the petitioner, Special Agent Feldman, on December 13, 1971, to testify and to produce certain records, documents, papers and information all as more fuliy set forth in the attached affidavit and summons. An attested copy of the summons was handed to the respondent on December 1, 1971. The summons issued to the respondent is attached hereto and incorporated herein as Exhibit A.

VII

The respondent, Solomon Fisher, has failed and refused to comply with said summons to testify and to produce documents as required by said summons.

VIII

In was and now is essential to the determination of the tax liabilities of the taxpayer, Morris Goldsmith, for the years 1969 and 1970, that the respondent, Solomon Fisher,

be required to testify and to produce the records, documents, papers and information demanded, as is evidenced by the affidavit of Special Agent Alan M. Feldman, attached hereto and incorporated herein.

WHEREFORE, the petitioners respectfully pray:

1. That this Court enter an order directing the respondent, Solomon Fisher, to show cause, if any he has, why he should not comply with and obey the summons described in Paragraph VI above, in each and every requirement thereof.

2. That this Court enter an order directing the respondent, Solomon Fisher, to obey the aforementioned summons in each and every requirement thereof, and ordering his attendance and testimony and production of records, documents, papers and information as required and called for by the terms of the summons, before Special Agent Alan M. Feldman, or any other proper officer of the Internal Revenue Service, at such time and place as may hereafter be fixed by Special Agent Feldman or any other proper officer of the Internal Revenue Service.

3. That the United States recover its costs in maintaining this action.

4. That this Court render such other and further relief as is just and proper.

LOUIS C. BECHTLE
United States Attorney

By: /s/ JAMES C. SOMMAR
Assistant United States Attorney

(Exhibit A to this Petition is a copy of the Summons printed on pages 4a-5a, supra.)

IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

AFFIDAVIT

ALAN M. FELDMAN, a petitioner herein, being first duly sworn deposes and says:

1. That he is a duly commissioned special agent of the Internal Revenue Service with post of duty at Philadelphia, Pennsylvania.

2. That in his capacity as a special agent, he was assigned to participate in the investigation of the tax liabilities of Morris Goldsmith for the years 1969 and 1970.

3. That pursuant to such investigation and in accordance with Sections 7602 and 7603 of the Internal Revenue Code of 1954, 26 U.S.C. §§7602 and 7603 (1964), a summons, Treasury Form 2039, was served upon Solomon Fisher, on December 1, 1971, by your affiant handing an attested copy of the summons to the respondent. The summons which is Exhibit A to this petition and made a part hereof, directed Solomon Fisher to appear before your affiant on December 13, 1971, in the offices of the Internal Revenue Service, 401 North Broad Street, Philadelphia, Pennsylvania, then and there to give testimony and to produce records, documents, papers and information in aid of the investigation of the tax liabilities of Morris Goldsmith for the years 1969 and 1970.

4. That Solomon Fisher appeared at the designated time and place in response to the summons but refused to testify or to produce the materials demanded and such failure has continued to the date of this affidavit.

5. That the testimony, records, documents, papers and information demanded by the summons served upon Solomon Fisher are necessary for the determination of the tax liabilities of Morris Goldsmith for the years 1969 and 1970.

Further your affiant saith not except that this affidavit is in support of a petition to enforce an Internal

Revenue summons issued by the Commissioner of Internal Revenue to Morris Goldsmith.

ALAN M. FELDMAN
Special Agent

Sworn to and subscribed before me this day of , 1972.

Notary Public

My commission expires

(Exhibit A to this Affidavit is a copy of the Summons printed on pages 4a-5a, supra.)

IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

(Caption Omitted in Printing)

ORDER TO SHOW CAUSE

Upon petition, the exhibit attached thereto, the affidavit of Special Agent Alan M. Feldman, Internal Revenue Service, and upon motion of Louis C. Bechtle, United States Attorney, it is

ORDERED that Solomon Fisher appear before the United States District Court for the Eastern District of Pennsylvania in that branch thereof presided over by the undersigned on the 3rd day of March, 1972, at 10.30 A.M. to show cause why he should not be compelled to obey the Internal Revenue summons issued to him on December 1, 1971. It is further

ORDERED that a copy of this Order, the petition, exhibit and affidavit be served upon the respondent, Solomon Fisher, at least 20 days prior to the time set for hearing. It is further

ORDERED that Special Agent Alan M. Feldman is especially appointed to serve this Order, the petition, exhibit and affidavit upon the respondent.

Dated at Philadelphia, Pennsylvania, this 8th day of February, 1972.

/s/ J. M. DAVIS
United States District Judge

IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

(Caption Omitted in Printing)

ANSWER TO PETITION TO ENFORCE INTERNAL REVENUE SUMMONS

FIRST DEFENSE

1. The allegations set forth in Paragraphs III and V of the Petition To Enforce Internal Revenue Summons ("Petition") are admitted. The allegations of Paragraph VII of the Petition are denied (see following paragraph). With respect to Paragraph VI, respondent admits only that Exhibit A is a copy of the document served on him on December 1, 1971. Respondent is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph VI and as to all the allegations of Paragraphs I, II, IV and VIII.

2. Respondent avers that to the extent that the records, documents, papers and information requested were in his possession, he brought them with him as requested in the purported summons but refused to deliver them to Special Agent Feldman for his examination. It is further averred that Respondent did not refuse to testify but rather that Special Agent Feldman refused to administer an oath to Respondent, even though Respondent specifically requested that he do same.

SECOND DEFENSE

3. The Petition does not state a claim upon which relief can be granted.

THIRD DEFENSE

4. The documents described in paragraphs 1 and 2 of the purported summons are the property of Morris Goldsmith.

5. The documents described in paragraph 3 of the

purported summons are the property of Sally Goldsmith.

6. Morris Goldsmith has the legal right to indefinite possession of the documents described in paragraphs 1 and 2 of the purported summons.

7. Sally Goldsmith has the legal right to indefinite possession of the documents described in paragraphs 1 and 2 of the purported summons.

8. The documents described in the purported summons were personally given to respondent by Morris Goldsmith on behalf of himself and his wife, Sally Goldsmith.

9. Respondent is the attorney for Morris Goldsmith and Sally Goldsmith, and the said documents were given to him as attorney for the said Morris Goldsmith and Sally Goldsmith.

10. Special Agent Alan M. Feldman is conducting his investigation for the purpose of bringing and obtaining evidence for a criminal prosecution.

11. Disclosure of the said documents by respondent as demanded in the purported summons would violate the right of Morris Goldsmith and Sally Goldsmith not to incriminate themselves.

FOURTH DEFENSE

12. Paragraphs 4 through 11 of this Answer are incorporated herein by reference.

13. Disclosure of the documents demanded in the purported summons would violate the right of Morris Goldsmith and Sally Goldsmith to communicate in confidence with respondent as their attorney.

FIFTH DEFENSE

14. Paragraphs 4 through 11 of this Answer are incorporated herein by reference.

15. Enforcement of the purported summons would violate the right of Morris Goldsmith and Sally Goldsmith not to be required to give up possession to the State of things within their control without the requirements of the Fourth Amendment being satisfied.

SIXTH DEFENSE

16. Paragraphs 4 through 10 of this Answer are incorporated herein by reference.

17. The purported summons was not lawfully issued and is legally null and void.

SEVENTH DEFENSE

18. The documents described in Paragraph 2 of the purported summons are not properly the subject of a summons for the additional reason that they are already in the possession of the Internal Revenue Service or the United States can obtain the documents directly from third parties other than the taxpayer or a person standing in a privileged relation to the taxpayer.

WHEREFORE, Respondent prays that this Court dismiss with prejudice the Petition of the United States and Alan M. Feldman and declare that the purported summons is not legally enforceable and that it is null and void.

/s/ Richard L. Bazelon
RICHARD L. BAZELON
2600 The Fidelity Building
Philadelphia, Penna. 19109
Attorney for Solomon Fisher

Of Counsel:

DILWORTH, PAXSON, KALISH,
LEVY & COLEMAN

Dated: February 25, 1972

IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

(Caption Omitted in Printing)

AMENDED PETITION TO INTERVENE

COME NOW, Morris Goldsmith and Sally Goldsmith, and respectfully move that this Court permit them to intervene pursuant to Rules 24(a)(2) and (b)(2) of the Federal Rules of Civil Procedure. In support of this request Petitioners represent that

1. They are the individual taxpayers whose records are being sought by the purported summons which the United States and Special Agent Feldman seek to enforce.

2. The records described in the summons were given by them to their attorney, Solomon Fisher, in confidence for the purpose of obtaining legal opinion and advice, at some time prior to the issuance of the summons.

3. The records described in the summons belong to Petitioners, and they have the right to indefinite possession of the records.

4. The records described in the summons are sought by the United States and Special Agent Feldman for the purposes of bringing and being used in a criminal prosecution against one or both of the individual Petitioners.

5. Production of the record described in the summons will violate Petitioners' right against self-incrimination, their right to confidential communication with their attorney, and their right not to have documents under their control given to the United States under compulsion without observance of the procedures and protections of the Fourth Amendment.

6. The intervention of Petitioners will not prejudice or delay the adjudication of the rights of the original parties to this proceeding.

Petitioners adopt Respondent's Answer to the Petition

To Enforce Internal Revenue Summons as the responsive pleading they will file if permitted to intervene.

/s/ Richard L. Bazelon
RICHARD L. BAZELON
2600 The Fidelity Building
Philadelphia, Penna. 19109

Attorney for Morris Goldsmith and Sally Goldsmith

Of Counsel:
DILWORTH, PAXSON, KALISH, LEVY & COLEMAN

Dated: March 2, 1972

(Affidavits of Taxpayers Omitted.)

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(Caption Omitted in Printing)

Before HON. JOHN MORGAN DAVIS, J.,

Philadelphia, Pa., March 3, 1972

Present: JAMES SOMMAR, Esq.
RICHARD A. SCULLY, Esq.
for the Government

RICHARD L. BAZELON, Esq.
for the Defendant

---

[1]

Colloquy

[2] THE COURT: You are representing the United States Government, Mr. Sommar?

MR. SOMMAR: Yes. At this time I would like to introduce the Department of Justice attorney who will handle the total litigation, Richard Scully.

THE COURT: We will admit you for the purpose of this case, Mr. Scully. Mr. Bazelon.

MR. BAZELON: Yes, your Honor. I am here this morning with Mr. Fisher and your Honor, Mr. Fisher and I have been giving some thought to a problem which we would like to advise the Court of before we proceed any further. I think Mr. Fisher would want to direct himself to it, inasmuch as it involves him personally.

THE COURT: Aren't you worried about the adage relating to a lawyer who is his own client?

MR. FISHER: We have considered that, your Honor. We have also considered the problem of the Canons and Code of Professional Responsibility, and that is I may be placed in a situation where I may be a witness in this case as well as being counsel, and that is indicated to be improper, with some exceptions, under the disciplinary rules.

Mr. Scully and I have spoken on the telephone after he arrived in town this morning, and I think we have agreed as being true what I would have testified to. So if I [3] might read into the record the facts to which we stipulate.

THE COURT: I was hopeful you might be able to stipulate as to most of the facts involved.

MR. FISHER: I think there is only one factual issue to be determined in this case and that is the ownership of the records in question.

THE COURT: Why don't you proceed with your stipulation and then if Mr. Scully agrees to it, I will decide whether I can approve it.

Colloquy

MR. FISHER: All right. The stipulation is as follows: that I am a member of the Bar of the Commonwealth of Pennsylvania and the District of Columbia, that I was an attorney with the Tax Division of the United States Department of Justice from 1960 through 1964, and from that date to the present I have been practicing with the firm of Dilworth, Paxson, Kalish, Levy and Coleman, of which firm I am presently a partner, and that I specialize in matters of income taxation.

On August 3, 1971 I was retained to represent Morris Goldsmith and Sally Goldsmith, and that on August 17, 1971 Morris Goldsmith and Sally Goldsmith turned over to me certain records which I now have in my possession. Such records were turned over to me for my use in representing them, [4] furnishing them with legal advice, and from the time those records were turned over to me to the present time I have been using them for that purpose.

In addition to that, I received a summons, which is an exhibit to the Government's petition in this case, on December 1, 1971. In compliance with the summons I reported on December 13, 1971 to the place there designated and I brought with me any records which might fit within the description contained in the summons which were in my possession.

I had previously to that date indicated to Special Agent Feldman that I would not turn over the records to him for inspection, although I would bring them with me in compliance with the summons. When I reached the office there was no stenographer present nor was there any attempt to swear me in as a witness. The only thing that took place was that the Government representative ascertained that I would not allow them to inspect the record, and I think that is the stipulation.

Your Honor, may I explain a moment why the latter part is in here. I am somewhat concerned professionally with the allegation that I refused to testify and I just want the record to be perfectly clear as to what occurred.

THE COURT: Do you agree to that as a stipulation of counsel, Mr. Scully?

[5] MR. SCULLY: Yes, sir.

THE COURT: Thank you, Mr. Scully. I will approve it.

MR. SCULLY: I don't know if counsel wants to go forward any further with their ethical objection.

MR. BAZELON: No, Your Honor. That solves that problem. We think, your Honor, that the next order of business is the petition to intervene of Morris Goldsmith and Sally Goldsmith which we filed and served on the Government last Friday and filed yesterday with your Honor. We feel that they are necessary parties to the case. We have submitted memoranda and the Government has submitted a memoranda as well.

In addition, your Honor, I would like to present you with an amended petition which only changes one phrase with respect to the second averment, if I may hand this up, to make absolutely clear that what I think was also part of the stipulation, although I don't recall the exact wording, but that these records were turned over to Attorney Fisher in confidence for the purpose of his rendering legal advice to the Goldsmiths.

Now, your Honor, I feel that in this case there are substantial constitutional questions. This is a case in which the records were in the hands of the taxpayer's attorney and at the very least we feel that they have the status, the [6] same status that they would have had in the hands of the taxpayer, and that, therefore, the taxpayer's important constitutional rights under the Fourth Amendment and particularly under the Fifth Amendment, as well as the attorney-client privilege to the extent that that is involved, are in this case, your Honor, and it is very important, and, in fact, may well be necessary that they be asserted by the taxpayer, inasmuch as these are their rights.

Now, as I understand, your Honor, the Government

memorandum against our petition to intervene, the Government does not dispute that this is the appropriate time and form [sic] to litigate those rights. The Government's position, as I understand it, is that we should be put to proof of all of the allegations in the petition to intervene.

Your Honor, the allegations in the petition to intervene go to the relationship of the taxpayer to these records. They are the core of the issue that is going to be before you in this hearing. We suggest that to have two hearings on the same issue does make sense and we therefore think, your Honor, that all of this should be litigated at one time with the taxpayers as parties who are in a position to raise and protect their rights.

THE COURT: Mr. Scully.

[7] MR. SCULLY: The Government, of course, opposes the rights of these taxpayers to intervene in this particular matter. I would agree there is no sense in having the question litigated twice. However, I believe it can be litigated only once no matter who is required to go forward with the proof that is involved.

The Government's position is, and I think respondents' counsel—

THE COURT: I don't mind telling you, Mr. Scully, that my inclination is to permit the intervention, so that it is up to you to argue that point to my satisfaction to stop my granting the petition.

MR. SCULLY: Yes, sir. Well, I would like to briefly, the most recent pronouncement of the Supreme Court in the summons enforcement area is in the United States vs. Donaldson, which specifically goes to the issue of the intervention of taxpayers in a summons proceeding where a summons is directed at a third party.

Now, the Donaldson case and Reisman vs. Caplan which went before it do recognize the right of a taxpayer to intervene under certain circumstances, and two that are enumerated and which seem to be involved in this case are

THE COURT: I am familar with the Donaldson case.

[8] MR. SCULLY: The two issues to be raised, improper corpus of the summons, it appears that issue has already been raised by the respondent and can be resolved without the taxpayer's participation.

With respect to the question as to whether the taxpayers have any interest in the materials which are sought to be produced, we believe that under the Supreme Court decision in United States vs. Powell, the taxpayers have the burden of doing more than merely alleging that these are their records. Powell involved a situation where there was an allegation of improper purpose. The Court said the taxpayer had to do more that alleges, had to come forward with affirmative proof. We would say this applied as well to the situation where the taxpayers claim an interest by virtue of their interest in the property sought to be produced. Otherwise the Donaldson opinion has no real effect because the taxpayer would be allowed to intervene merely on an allegation of interest.

MR. BAZELON: Your Honor, if I may respond just briefly.

THE COURT: You may. You are familiar with this Donaldson case too?

MR. BAZELON: Yes, I am, your Honor. In fact, we quote and rely on the Donaldson case, along with other [9] cases.

Your Honor, the Donaldson case involved a situation where the taxpayer admitted that there was no substantial constitutional question, that he had no claim to any property rights to the documents being sought. It is a situation which has no bearing on the case before your Honor where there is a very substantial question as to the rights of the taxpayer in these records, and the records were neither in the hands of the taxpayer or in the hands of his attorney in the Donaldson case, and the Court explicitly recognized that and limited its holding to the facts before it and then went on to approve the language in the prior Reisman case in which intervention had been allowed.

Given the fact that there is a substantial issue of ownership in this case, while the Government does not agree with our position, I think that the Government would recognize in the allegations contained in the petition that it is far from a frivolous issue. The Court's pronouncement in Donaldson is, as I read it, is that where there are substantial constitutional questions which involve the taxpayer's rights, the taxpayers should be part of the proceeding, and that is the position we take.

MR. SCULLY: I have only one more thing I would like to point out the Court. Since the issue is the ownership [10] or right to possession of accountant's work papers in this case, under Pennsylvania law, 63 Pa. Statutes Section 9.11, working papers of an accountant are presumed to be the property of the accountant, absent an express agreement to the contrary. So I would think that unless the taxpayers can make a prima facie showing of property right in these work papers, they haven't met the substantial interest requirement of Donaldson.

MR. BAZELON: Your Honor, we are well aware of the statute that is referred to, and that may be relevant to the question of what property rights exist. It is relevant to the evidentiary hearing.

The statute does have a provision about express agreement. It also has a provision concerning whether or not the records have been submitted to the taxpayer by the accountant. These are matters which should be gone into in an evidentiary hearing in which the taxpayers are participating as parties.

THE COURT: I have read Donaldson several times and I don't think it really has any bearing on the question of whether or not the taxpayer had the right to intervene in this matter, and on that basis I will allow the intervention.

Now, as to the other matters which are important to you, Mr. Scully, and to the I.R.S., I am perfectly happy to hear the whole case which that fact involves. I am allowing

[11] the intervention. Now you can proceed with the rest of the case.

MR. SCULLY: The Government calls Alan M. Feldman.

ALAN MORRIS FELDMAN, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. SCULLY:

Q Mr. Feldman, by whom are you employed?
A Internal Revenue Service, Intelligence Division.
Q And what is your capacity?
A Special Agent.
Q How long have you been a Special Agent?
A A little more than two and one half years.
Q In your capacity as a Special Agent of the Internal Revenue Service were you assigned to investigate the tax liabilities of Morris Goldsmith?
A Yes, I was.
Q What years were you assigned to investigate?
A 1969 and 1970.
Q In the course of your investigation did you contact Mr. Harold Berson?
A Yes, I did.
Q How did you come about contacting Mr. Berson?

[12]

A Mr. Berson is known to have been the accountant and returns preparer for Mr. Goldsmith.
Q After contacting Mr. Berson did it become apparent to you that there were certain materials prepared by him that you thought should be examined?
A Yes.
Q Could you describe those materials?
A During the interview with Mr. Berson he stated he prepared analysis of receipts and disbursements.

MR. FISHER: I object, your Honor, to anything Mr. Berson may have said.

THE COURT: On what basis?

MR. FISHER: It is hearsay.

THE COURT: It certainly is hearsay, but it is part of the entire proceeding.

MR. FISHER: Mr. Berson is here in court today under Government summons.

THE COURT: Well then you can refute it. I will permit the witness to testify.

MR. FELDMAN: I was told that the analysis of receipts and disbursements were used to prepare the tax returns as filed.

MR. SCULLY: Your Honor, before we go any further, can I get a clarification as to who is representing the [13] respondent for the purposes of this hearing?

MR. BAZELON: Yes, your Honor, I think the way we will proceed, if it is acceptable to your Honor, is that now that we have resolved the problem of any conflict or, hopefully, of any problem with the Canons of Ethics, that Mr. Fisher will proceed to examine and cross examine witnesses.

THE COURT: Do you have any objection to that, Mr. Scully?

MR. SCULLY: I have no objection as long as it is one or the other.

THE COURT: Yes, it has to be one of you.

MR. BAZELON: Yes, your Honor, we realize that.

THE COURT: And Mr. Fisher is going to conduct any further examination or handling of any cross examination?

MR. FISHER: That is correct, your Honor.

MR. SCULLY: I have no objection to that, your Honor.

BY MR. SCULLY:

Q I take it you learned of the existence of these materials from Mr. Berson himself?
A That's correct.
Q And did he tell you how these materials were prepared?
A Yes, he did.
Q And how was that?
A At the end of the year Mr. Goldsmith would bring in his cancelled [14] checks and deposit slips and from these he would prepare an analysis of receipts and disbursements and then prepare tax returns from this analysis.
Q And had he done this for Mrs. Goldsmith as well?
A Yes, that's correct.
Q Did you ask Mr. Berson to produce the work papers?
A Yes, I did.
Q And did he do so?
A No, he did not.
Q Did you—I would like to have this marked for identification. (G-1, being a summons directed to Harold Berson, was marked for identification.)

BY MR. SCULLY:

Q Mr. Feldman, I show you Government exhibit one for identification and ask you if you could identify it?
A Yes, I can.
Q And would you identify it for the Court please?
A Yes, I prepared this.
Q Would you describe what it is?
A It's an Internal Revenue Service summons, Form 2039.
Q And to whom is it directed?
A Harold Berson, C.P.A.
Q Did you serve this summons on Mr. Berson?
A Yes, I did.

[15] MR. SCULLY: I would like to offer this in evidence.

THE COURT: Thank you.

BY MR. SCULLY:

Q At the time you served this summons, Government's exhibit one, on Mr. Berson, did he comply with the summons and furnish the material sought therein?
A No, he did not furnish the materials.
Q Specifically referring to the work papers that were sought in the summons, did he give you any reason for not producing them?
A Yes, he did.
Q And what was that?
A Mr. Berson told me that subsequent to my contacting him Mr. Goldsmith had told him that he was under investigation by the Internal Revenue Service and that he asked if he could show the work papers to his attorney and Mr. Berson gave him the work papers.
Q Now, the summons has a return date of 3rd November, 1971. Did you——if Mr. Berson no longer had the papers in his possession, why did you put a return date of November 3rd on the summons?
A The summons is due within ten days and Mr. Berson said that he would contact Mr. Fisher and ask for the return of his records in compliance with the summons.
Q Now, did Mr. Berson appear pursuant to the summons on the 3rd of November, 1971?
A There was a misunderstanding on that point. I told Mr. Berson [16] that if the information was not available or if he was unable to get hold of the work papers as I had summoned, then he need not appear as I had already interviewed Mr. Berson, and there was a misunderstanding and Mr. Berson appeared at our office on that day and I was at that time not in and I didn't see him, but I did call him later that day.
Q You did call him after he had appeared at the office?
A That's correct.

Q And did he advise you as to whether or not he had been able to obtain the work papers?
A He advised me he was unable to obtain them.
Q Did he advise you he made an effort to obtain them?
A Yes, he did.
Q And did he advise you he considered the work papers to be his property at the time?
A Yes, he did.
Q Did he also advise you he considered the work papers to be his property when you first served the summons on him?
A Yes, he did.
Q After November 3rd when Mr. Berson advised you he did not have the records, I believe he said Mr. Fisher had them at that point?
A Yes.
Q What did you do with respect to obtaining them from Mr. Fisher?
A At that point I did nothing. Mr. Fisher prior to that time had [17] informed me that he had records in his possession and that after he would review these records he said he may make certain available to the Service and I was hoping for those records rather than having to serve a summons.
Q And did he at any time produce any papers for your inspection?
A No, he did not.

MR. SCULLY: Your Honor, at this time I would like to have marked for identification the original summons served to the respondent, Mr. Fisher, which is part of the Court's file, having been attached to the petition in this case.

THE COURT: We are talking about what, G-1?

MR. SCULLY: No, sir. This is an additional summons and one that was served on Mr. Fisher.

MR. FISHER: I have no objection to his using a copy if it makes it easier.

THE COURT: Do you have a copy?

(G-2 being a summons directed to Solomon Fisher, was marked for identification.)

BY MR. SCULLY:

Q Mr. Feldman, I show you Government exhibit 2 for identification and ask you if you can identify it please?
A Yes, I can identify this.
Q Would you state for the record what it is?
A It is the Internal Revenue Service summons to Solomon Fisher, Esq., [18] Form 2039.
Q And did you serve this upon Mr. Fisher?
A Yes, I did.
Q And what date did you serve it?
A December 1, 1971.

MR. SCULLY: I would like to offer this as Government's exhibit 2.

THE COURT: It may be admitted.

BY MR. SCULLY:

Q Why did you feel it was necessary at this particular point to serve this summons on Mr. Fisher?
A Between the time I first contacted Mr. Fisher and the time I served this summons, Mr. Fisher had told me he was going to review Mr. Goldsmith's records and he may make certain records available, and I was hoping at this time to get the records prior to issuing a summons, but on the same date as the issuance of the summons, I phoned Mr. Fisher again asking him for the records he said he may make available, and Mr. Fisher informed me he was no longer going to represent Mr. Goldsmith and he was going to return the records to Mr. Goldsmith and, as far as he was concerned, I could contact Mr. Goldsmith.

Q At this point you served the summons on Mr. Fisher?
A Yes, I did.
Q And did Mr. Fisher appear pursuant to that summons?
[19]
A Yes, he did.
Q Did he produce the records sought there?
A No, he did not.
Q Could you tell the Court why the work papers sought in the summons are necessary in order to complete your investigation on the tax liabilities involved?
A Well, the tax returns themselves were prepared from the work papers and one of the aspects would be to tie in the work papers to the tax returns. The point is they may show other areas of taxpayer income that Mr. Goldsmith may have.
Q Now, one of the sets of documents that you were seeking and is listed in the summons are retained copies of withholding tax returns, is it not?
A That's correct.
Q And have you since that time been able to obtain similar copies from other sources?
A Yes, I have.
Q So you are no longer seeking this particular document?
A That's correct.
Q After this case was assigned to you did you contact the taxpayer, Morris Goldsmith?
A Not Morris Goldsmith. I tried to. I contacted his wife.
Q And were you at any time able to reach Mr. Goldsmith?
A No, I was not.
[20]
Q Did you speak with him on the phone?
A Yes, the day after I contacted Mr. Goldsmith's wife he telephoned me.
Q Do you recall the date you spoke with him?
A I think it was July 30, 1971.
Q And what was the purpose of that telephone call?
A I had contacted Mrs. Goldsmith the day before hoping

to find Mr. Goldsmith, and at that time I left a message asking Mr. Goldsmith to call me, and the next day he called me.
Q At that time did you advise Mr. Goldsmith of your identity?
A Yes, I did.
Q And your position with the Internal Revenue Service?
A Yes, I did.
Q And can you tell me what else you advised him?
A I told Mr. Goldsmith that I would like to make an appointment to discuss his tax liabilities.
Q And did you, in fact, make an appointment with Mr. Goldsmith?
A Yes, we did.
Q Was that appointment kept?
A No, it was not.
Q Can you tell the Court why?
A I was contacted by Mr. Fisher and Mr. Fisher told me he was representing Mr. Goldsmith and that Mr. Goldsmith would not appear for that appointment.
[21]
Q And do you recall the date that you were contacted by Mr. Fisher?
A I think it was August 3rd.
Q Just to clarify and make perfectly clear this particular point, you did advise Mr. Goldsmith when you spoke with him that you were conducting an investigation into his tax liabilities?
A Yes, I did.

MR. SCULLY: I have no further questions, your Honor.

CROSS EXAMINATION

BY MR. FISHER:
Q Mr. Feldman, what was the date on which you first contacted Mr. Berson?
A I think it was October 22, 1971.

A. M. Feldman—Cross

Q I don't want to speculate. Do we know that is the date?
A That is the date I interviewed Mr. Berson. I am not sure whether I called and made an appointment or not.
Q I believe we already stipulated the records were delivered to me on August 17, 1971. Now won't you agree that that was before you contacted Mr. Berson?
A Yes.
Q Didn't you testify just a few minutes ago that Mr. Berson delivered the records to me after you contacted him?

[22]

A No, he said that some time before I contacted him.
Q So that if you did testify that way it was an error, is that correct?
A Yes.
Q Now, do I understand that does the Government now agree that with respect to this enforcement proceeding it only relates to items one and three of the summons which was served on me and item two no longer is part of this case?

MR. SCULLY: That is correct.

BY MR. FISHER:

Q Mr. Feldman, you indicated that you work for the Intelligence Division?
A That's correct.
Q Is there something also known as the Audit Division?
A That's correct.
Q And they are two separate divisions within the I.R.S.?
A That's correct.
Q And am I correct in saying that it is the general function of the Audit Division to conduct audits in order to ascertain the civil liability of a taxpayer?
A I am not sure if that is the correct function. I haven't read the exact function of that.

A. M. Feldman—Cross

Q Have you brought with you any manuals pursuant to a subpoena that was served upon you?

[23]

A Just my handbook.
Q Does that contain in that handbook the various functions of the different departments of the Internal Revenue Service?
A No, it doesn't.
Q Do you ever conduct a joint investigation with a revenue agent?
A Yes.
Q And a revenue agent, just to clarify the terminology, a revenue agent is a person in the Audit Division and a Special Agent is one who is in the Intelligence Division, is that correct?
A That's correct.
Q Now, having worked with the revenue agents, and knowing that in many cases they work independent of special agents, could you tell us whether or not you know whether or not it is their job to investigate and determine civil tax liability?
A I imagine that is part of their job.
Q What else is their job?
A Among other things they determine the tax to be levied on levy assessments, and I am not aware——I know there are other jobs. I am not really familiar with all of the jobs of the revenue agent.
Q Is there also a collection division, Mr. Feldman?
A Yes, that's correct.
Q Isn't it the Collection Division's responsibility to levy?
A They make the levy. They actually seize the property.

[24]

Q The revenue agent determines the liability and the revenue officer, which is a different department, the Collection Department, he is the one who actually enforces the levy?
A That's right.

Q So so far all we have been able to determine is that the revenue agents' responsibility is to determine tax liability. Is there anything else?

A I am not sure.

Q So to the best of your knowledge that is all that they do, is that correct?

A They determine tax liability, that's correct.

Q Now, in many cases is it true that a special agent makes a joint investigation with a revenue agent?

A That's correct.

Q Is there a revenue agent conducting this investigation of Morris Goldsmith with you?

A No.

Q Would you tell us the reason for that?

A It has not proceeded to a point where we would feel it would be necessary to ask a revenue agent's assistance.

Q Would you say then, sir, that your investigation is in its preliminary stages?

A That's correct.

Q What determination do you make as to whether or not the [25] investigation goes beyond a preliminary stage? What is the criteria?

A Whether or not I feel there is more income than Mr. Goldsmith is reporting on his returns.

Q So that if you determine Mr. Goldsmith had more income, even though you determined it was not in any way related to fraud, would you continue your investigation or would you withdraw from the case?

A It would depend upon the individual circumstances. I don't know.

Q So, in other words, you may continue on a case under your own internal procedures even after you have made a determination there is no criminal violation of the Internal Revenue Laws?

A Yes, I may.

Q Would you look at your handbook and see if your handbook states that the criteria is that you are to

withdraw from a case if it is determined that there is no criminal responsibility?

MR. SCULLY: I would object to that question. We are talking about something that is going to happen in the future. What we are concerned with is the present status of the investigation and not what may some time occur or not occur.

MR. FISHER: If I may, your Honor, as I understand the procedure used by the Internal Revenue Service as applicable in this case at this moment, it is Mr. Feldman's job to determine [26] whether or not there are sufficient facts to enable him to continue in this case to make a criminal fraud investigation. I think that is the issue. I want to clearly point out to the Court that no revenue agent is in this case whose responsibility it normally is to determine the tax liability of the taxpayer, that this is a very preliminary inquiry to determine criminal liability, and that the usual people are not here who determine civil liability.

MR. SCULLY: Your Honor, it has not been determined at this point that Mr. Feldman is not authorized or empowered to inquire into civil tax liability. The whole point of this investigation is to find out if there has been additional income and additional tax liability whether there is any evidence of fraud or not.

MR. FISHER: I submit that is counsel testifying and not Mr. Feldman testifying.

THE COURT: Well, it is necessary to hear it from somebody. Why don't you explore it?

MR. FISHER: That is what I was trying to do.

THE COURT: Why don't you do it?

MR. FISHER: Would you read back the last question?

(Last question read by court reporter.)

[27]

BY MR. FISHER:

Q Would you look at your handbook, Mr. Feldman?

MR. SCULLY: Perhaps it would facilitate matters if we could determine whether there is any such section or language in the handbook that he should refer to.

MR. FISHER: Do you know the answer?

THE COURT: I don't see how counsel could know what is in the handbook. Mr. Feldman would certainly be much better equipped to pick out of the handbook what he needs to answer the question.

MR. SCULLY: Yes, sir. I would suggest he be asked if he can find the answer in a handbook.

MR. FELDMAN: I am not sure that I can. I know that my position is to——

THE COURT: It is your handbook.

MR. FELDMAN: Well, yes, it is, but he is asking a specific section and I am not sure whether that section is in there. In other words, I have not memorized the handbook.

THE COURT: Where would you suggest that it might be found?

MR. FELDMAN: Well, probably in the Internal Revenue Service Manual. Since this is the section, it probably is in here somewhere, the criteria for withdrawing from an investigation.

THE COURT: It is your handbook. You tell us [28] whether you can find it. I think it is a perfectly proper question.

MR. FELDMAN: This section deals with withdrawals, but it states that except under circumstances outlined in

3 below, a special agent shall withdraw from a full scale investigation. The only difference is I have not reached that stage. It is not a full scale investigation.

BY MR. FISHER:

Q Mr. Feldman, is there anything in there about the conduct during the course of the preliminary stages of your investigation?

THE COURT: Does your handbook tell you that you work for the Secretary of the Treasury, Mr. Feldman?

MR. FELDMAN: I imagine it does, your Honor. In other words, I am not familiar with the entire handbook. I imagine in there it would state for whom I do work, but this section on Planning and Conducting Preliminary Investigations——

THE COURT: The reason I ask, the statute is very clear. It authorizes the Secretary or his delegate, officers or employees of the Treasury Department to proceed. Are you familiar with Section 5602, Mr. Fisher?

MR. FISHER: Is that the summons provision, your Honor?

THE COURT: Yes.

[29] MR. FISHER: I would agree the regulations under that section——

THE COURT: I don't really know what we are fighting about. If this is correct——

MR. FISHER: The cases say, your Honor, first of all, let me go further from the statute. I will admit that the regulations of the Internal Revenue Service that are issued under that section delegate, purport to delegate the authority to issue summons to the special agents of the Internal Revenue Service.

THE COURT: That's right.

MR. FISHER: However, the cases say that summonses being used for the purpose of a criminal investigation and not jointly for a civil and criminal investigation, that the summons, even though the specific authority to issue it is in the regulations, but the summons is not proper, and that, of course, is the point that I am trying to raise.

THE COURT: Do you have a case on that point?

MR. FISHER: Yes, sir. If you would just give me one moment, your Honor.

THE COURT: Well, the Donaldson case does read, "We hold an Internal Revenue Summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution."

Now, certainly this is prior to any criminal [30] prosecution or recommendation, right?

MR. FISHER: That is correct, sir.

THE COURT: Now, doesn't the Donaldson case state clearly that Section 7602 is valid?

MR. FISHER: Yes, sir, but I think that the other cases when read in conjunction with Donaldson, and the cases are not overruled by Donaldson——

THE COURT: Donaldson is 1970.

MR. FISHER: Yes, I know, but the Supreme Court did come out and say, and I think if you read Donaldson in connection with the Supreme Court decision that preceded it and the cases cited with approval by the Supreme Court, there are cases that say when you can establish that the sole purpose of the investigation is to ascertain evidence for a criminal prosecution, it is not a valid purpose within the meaning of the statute.

THE COURT: You haven't brought that out yet. Are you going to?

MR. FISHER: I am trying to, your Honor.

THE COURT: I don't know why you are trying. Find out.

BY MR. FISHER:

Q Mr. Feldman, you haven't been able to find the standard I have referred to?

A I have a section marked preliminary investigation, but there is [31] no section as you requested.

Q In a normal case, Mr. Feldman, doesn't the investigation usually commence with a special agent and a revenue agent working jointly?

A No, it does not. You mean in intelligence?

Q Yes. Would you say that more often than not a case starts with a special agent working by himself?

A That's correct.

Q When a special agent is working by himself and he visits a person who is under investigation doesn't he say the following to him: "I am a special agent of the Internal Revenue Service, but as a special agent it is my duty to investigate the possibility of criminal tax fraud and in connection with the investigation of your returns you have a right under the Fifth Amendment of the Constitution of the United States not to answer any questions or submit any information if the answers or information might incriminate you in any way"?

A In essence that is what it does say.

Q You are requred by your own internal rules to make that statement, is that correct?

A That's correct.

Q And you further state to a person under investigation that any answers he gives or any information he submits might be used against him in any criminal proceeding which might be undertaken?

A That's correct.

[32]

Q And you also tell him he has the right to an attorney, is that correct?

A. M. Feldman—Cross

A That's correct.
Q Now without specifically identifying the source, could you tell us what the reason was that you were asked to investigate or assigned to investigate the tax liability of Morris Goldsmith?
A It was alleged that Mr. Goldsmith may have more income than he is showing on his tax return.
Q Can you tell us whether it was alleged by an individual or by a Government agency?
A Originally it was alleged by an individual.
Q Was it alleged to the Internal Revenue Service by an agency other than the Internal Revenue Service?
A Yes, it was.
Q Could you tell us what that agency is?
A It was a corporation, a publicly held corporation.

THE COURT: A what?

MR. FELDMAN: By an individual in a publicly held corporation.

BY MR. FISHER:

Q In other words, it was not another agency of the Government?
A No, it wasn't.
Q So the recommendation came directly to the Internal Revenue [33] Service from an outside source?
A The recommendation?
Q The information came directly to the Internal Revenue Service?
A To an individual in the Internal Revenue Service.
Q Not to someone outside the Internal Revenue Service?
A That's correct.
Q Mr. Feldman, is the Intelligence Division divided up into some people who specialize in working with specialized kind of cases or with cases that might be considered to be organized crime cases or anything such as that?
A Yes, it is.

A. M. Feldman—Cross

Q Are you in any of those specialized sections?
A No, I am not.
Q Mr. Feldman, in the summons which you served I notice there is a distinct change of language in the summons you served Mr. Berson and the summons which you served upon me. Was there a reason for that?
A May I see the summons?

(Exhibits handed to witness.)

MR. FELDMAN: Could you point out what do you meanby the language?

BY MR. FISHER:

Q The items sought are different?
A The items asked for are different, yes.
[34]
Q So that you did not ask me for the work papers of the accountant, did you?
A No, I did not. I'm sorry, what was that? It says here——
Q Read items one and three, would you?
A Analysis of receipts and disbursements for Morris Goldsmith for 1969 and 1970, copies of payroll tax returns for Morris Goldsmith for 1969 and 1970, and an analysis of receipts and disbursements for Sally Goldsmith for 1969 and 1970.
Q Now, those items are not referred to as the accountants work papers, are they?
A In those lines, no.
Q Well, in your original summons you called something the accountant's work papers, don't you, all work papers?
A All work papers, permanent files.
Q Now, under items one, two and three you have not asked me for work papers, is that correct?
A No. That's correct.
Q I am sorry for asking a negative question. It is correct

that that does not anywhere describe items one, two or three as being the accountant's work papers, is that correct?

A In those specific articles, those numbers, no, but below it it did.

Q Does it say work papers anywhere on that summons, does that language appear?

[35]

A The word work papers does not appear.

Q So nowhere in the summons you served upon me is the word work papers, is that correct?

A The word work papers, no.

Q Mr. Feldman, have you examined the tax returns for the years 1969 and 1970 of Morris Goldsmith?

A I have them in my possession and I haven't made an examination of them, let me put it that way.

Q Physically you have looked at them, is that correct?

A Yes.

Q Do you have them here with you?

A Yes, I do.

Q Do you recall whether Morris Goldsmith filed an individual return or a joint return for those years?

A A joint return for those years.

Q And the tax liability on a joint return is determined jointly, is that correct?

A That's correct.

Q And yet your summons only refers to Morris Goldsmith's tax liability, is that correct?

A That's correct.

Q Is there any way on a joint return that you can ascertain the liability of one taxpayer without determining the income and expenses of the other?

[36]

A For the purposes of my examination, yes. The actual tax liability can be determined in examining one person and not the other.

Q Does the Commissioner have authority to determine a person's tax liability on an individual basis when

that person had filed a joint tax return, Mr. Feldman?

A You are talking about my examination, is that correct?

Q Well, answer the question.

THE COURT: Aren't you asking him for a legal opinion, Mr. Fisher?

MR. FISHER: I think Mr. Feldman tells us one of the purposes of his examination is a civil determination of tax liability and I think I can establish he never for the purpose of determining civil liability where a joint return is filed determines it on an individual basis.

MR. SCULLY: I would like to respond to that. I believe he is asking for a legal conclusion. The fact that there is a joint income tax return may mean that if additional income is found for either husband or wife there will be additional joint liability. However, this does not mean that you can't examine one to find out if he had additional income in and of himself without examining the other. The fact that the other may be liable as a matter of law because he or she signed the return had nothing to do with the investigation of one person or the other.

[37] THE COURT: I didn't think that's what Mr. Fisher meant, but I am trying to find out just what you do mean.

MR. FISHER: Let me rephrase the question on the issue, your Honor.

THE COURT: Fine, I will be glad to have you do that.

BY MR. FISHER:

Q When civil liability of a taxpayer is computed, for example, if you were determining someone's tax liability, and I think that is the language you have used in your affidavit, somebody's tax liability, when a person files a joint return am I correct in stating that the Internal Revenue Service determines the

liability based on the joint items of income and expenses?

A The ending figure would be a joint liability.

Q So that if someone files a joint return the Internal Revenue determines the ultimate tax liability on a joint basis, is that correct?

A The ultimate tax liability is joint.

Q And you make your computations jointly to determine that liability?

A Based on the percentages.

Q I don't want to go through the whole return, but you determined all your percentages and everything are determined on a joint basis, is that correct?

A The liability is.

[38]

Q Well, the medical expense deduction limitation is determined jointly, is that correct?

A That's correct.

Q And the charitable contribution is determined jointly, is that correct, twenty percent of adjusted gross income jointly?

A Right.

Q As a matter of fact, every single one of those computations are determined jointly, is that correct?

A Those computations are.

Q And there are different tax tables in determining tax liability, is that correct?

A That's correct.

Q And there is a special table you use for joint returns, is that correct?

A That's correct.

Q And that would be the one that you would use in connection, in determining the tax liability of Morris Goldsmith for the year, is that correct?

A For Morris and Sally, that's correct.

Q Well, also for Morris because his income is on that return, is that correct?

A Yes.

Q Now, assuming a case goes through the normal civil routine that [39] it goes through in the Internal Revenue Service, am I correct in saying that you could not issue a proposed deficiency letter for Morris alone under these circumstances?

A Would you repeat that?

Q Would you read the question back?

(Question read by court reporter.)

MR. FELDMAN: That would be correct.

BY MR. FISHER:

Q Let's go back to your various conversations with Mr. Berson. I think you testified that Mr. Berson had told you that he had turned the records over to me or to Mr. Goldsmith?

A To Mr. Goldsmith.

Q And did you also testify that that was, that Mr. Berson told you that that was after you first contacted him?

A Prior to. I believe I said prior to.

Q O.K. I just want to make that clear. There was no summons outstanding or, as a matter of fact, you had not even contacted——strike that, I would like to rephrase the question. Isn't it true, Mr. Feldman, that based on the time that Mr. Berson indicated to you he had turned over the records to Mr. Goldsmith that at such time you had never met with the taxpayer, that you had never spoke to Mr. Berson, and that you had not at any time issued any summons to any person with respect to this case?

A I have never met personally with Mr. Goldsmith.

[40]

Q That is correct.

A But I had talked to him on the telephone.

Q That is correct. With that qualification, everything I said is correct?

A Correct.

MR. FISHER: I have no further questions, your Honor.

THE COURT: Thank you. Any redirect?

MR. SCULLY: A few questions, your Honor.

REDIRECT EXAMINATION

BY MR. SCULLY:

Q The question was asked concerning the different language in the two summonses. I would ask you to look at the exhibit G-1 and the exhibit G-2 again. Isn't it a fact that you prepared the summons, G-1, issued to Mr. Berson, before you met and spoke with him?
A That's correct.
Q So you didn't know what papers he might have in his possession at that time?
A That's correct.
Q And isn't it also a fact that by the time you got around to serving a summons on Mr. Fisher that you had ascertained from Mr. Berson just what work papers he had prepared?
A He told me exactly what he had prepared and that is what I put [41] on the summons.
Q He also told you that they were his work papers, did he not?
A That's correct.
Q With respect to the tax returns of Morris and Sally Goldsmith isn't it a fact that there are two schedule Cs attached to that return, one for Morris Goldsmith's professional business income and one for Sally Goldsmith's professional business income?
A That's correct.
Q And isn't it quite possible that you can have an adjustment of the ultimate tax liability if there is an additional income applicable to one or the other schedule C?

A That's correct.

MR. SCULLY: I have no further questions.

THE COURT: Recross?

MR. FISHER: Yes, one or two please, your Honor.

RECROSS EXAMINATION

BY MR. FISHER:

Q Did you speak with Mr. Berson prior to the time you visited with him?
A If I did it was only to make an appointment.
Q So that your testimony is that the date that is shown on your summons that you served him was the first date, other than making an appointment, was the first date that you had any substantive [42] conversation with Mr. Berson, is that correct?
A That's correct.
Q Now, in the course of your two and one half years investigation or two and one half years employment by the Internal Revenue Service you had had occasion to investigate a number of taxpayers?
A That's correct.
Q To examine books and records of a number of taxpayers?
A That's correct.
Q Cash receipts and cash disbursements are only one item of books, is that correct?
A Of the taxpayer?
Q Yes.
A It would depend on the taxpayer.
Q Isn't it possible there is more than one book?
A Yes.
Q More than a cash receipts book and a cash disbursements book?
A Certainly.

Q Don't many taxpayers keep their own cash receipts and cash disbursements book?
A That's correct.
Q As a matter of fact, don't accountants have their own work papers which are not necessarily the same thing as cash receipts and cash disbursements?

[43]

A They may have.
Q That is correct, what I said is correct?
A They may have. They may have others, yes.
Q Are you willing to accept that there is a difference between accountants work papers and cash receipts and cash disbursements records?
A No.
Q You think they are all the same, is that correct?
A They may be the same depending upon the circumstances.
Q And they may be different, is that correct?
A They may be different, that's correct.

MR. FISHER: I have no further questions.

THE COURT: Redirect?

MR. SCULLY: Nothing further.

THE COURT: Thank you, Mr. Feldman.

(Witness leaves stand.)

MR. SCULLY: The Government calls Mr. Harold Berson.

THE COURT: Gentlemen, may I see counsel?

(Unreported sidebar conference follows.)

HAROLD BERSON, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

[44]

BY MR. SCULLY:

Q Would you state your address, Mr. Berson?
A I reside at 210 Rydal West in Jenkintown.
Q What is your occupation, sir?

THE COURT: Rydal West, that's an apartment house, Mr. Berson?

MR. BERSON: Yes.

THE COURT: Where is it located?

MR. BERSON: It is on the Fairway opposite Wanamaker's. I don't have a number. It's an apartment.

THE COURT: Is it on Old York Road?

MR. BERSON: It's off Old York Road.

BY MR. SCULLY:

Q What is your occupation, sir?
A I am a Certified Public Accountant.

THE COURT: Would you keep your voice up please because I don't think anyone in the room could hear you. You are directing your voice to me and I don't hear you very well.

BY MR. SCULLY:

Q Do you have your own accounting firm, Mr. Berson?
A Yes, I do.
Q Are you acquainted with Morris Goldsmith?

[45]

A Yes, I a[illegible]

Q And how long have you known him?
A Oh, between twenty and thirty years.
Q Have you performed accounting services for Mr. Goldsmith?
A Yes, I have.
Q And also for his wife?
A Yes, I have.
Q And could you describe the accounting services that you have performed for him generally?
A We prepare their returns each year from summaries or records that are kept from their cancelled checks and deposits that they make during the year.
Q And did you perform these services for the taxpayer, Morris Goldsmith, for 1969 and for 1970?
A Not personally, but I directed the work that was done.
Q I see. Now, were these services performed in the position of an independent accountant rather than as an employee of Mr. Goldsmith?
A It is an unusual aspect of this type of accounting service because there is a write-up involved which we don't do for everybody. Well, you have a split personality because as you are writing up work for them you are doing sort of a bookkeeping service and you would be an employee per se, even though you are not on the [46] payroll that way, and on top of that you would have the accounting work which is getting the figures together for the return.
Q How do you will Mr. Goldsmith, on an hourly basis?
A No, we work on a yearly fee that includes whatever charges are made for the year.
Q Mr. Goldsmith, I will show you Government's exhibit——

MR. FISHER: Mr. Berson.

BY MR. SCULLY:

Q Excuse me, Mr. Berson, I show you Government's exhibit number two and ask you to look at the materials that are sought by the summons described in paragraphs one, two and three?

A Yes.
Q Did you or your firm prepare those materials?
A Yes.
Q And were they kept in the possession of yourself or your firm after the tax returns were filed?
A Just for certain periods. Records were always returned to clients after three or four years. The accumulation gets out of hand.
Q In respect to those documents referred to for 1969 and 1970 how long were they retained by yourself or your firm?
A Well, on the request by Mr. Goldsmith in the early part of August, stating that he wanted to have the records examined by his attorney because he felt that something was going on that he wanted [47] to get to his attorney, we gave the balance of what we had to him.
Q And did he tell you what that something that was going on was?
A Just that he suspected something about an investigation, but he did not know for sure.
Q Did he tell you by whom the investigation was being made?
A No, he didn't, no.
Q And do you recall what date in August he requested that you turn the papers over to him?
A It was the early part of August. I could not honestly tell you the exact date.
Q Do you recall being visited by Special Agent Feldman on October 22, 1971?
A I don't remember the exact date, but I know he was there.
Q At that time did he ask you what services you had performed for Mr. Goldsmith?
A Yes.
Q And did you describe the services?
A I believe I did.

Q And also the papers that you had prepared in the course of performing those services?

A Yes.

Q And did you also tell him that you had turned the specific papers, certain of the papers over to Mr. Goldsmith at his request?

A Yes, I did.

[48]

Q I believe on that date Mr. Feldman also served a summons upon you, did he not?

A Yes, he did.

Q And did you agree to obtain the work papers that you had discussed with him from Mr. Goldsmith in order to comply with that summons?

A The word agree is a relative word. I said I would speak to Mr. Goldsmith and find out whether he could return the records to me.

Q Did you also tell him that you would contact Mr. Fisher concerning the records?

A That I don't remember. He did serve the summons which stated on a certain date I was to come up with the records.

Q In the course of performing your services for Mr. and Mrs. Goldsmith were you retained directly by them?

A Yes.

Q In other words you were not hired or retained by Mr. Fisher, were you?

A No.

Q And have you ever performed any services for Mr. and Mrs. Goldsmith at the request of Mr. Fisher?

A No, I didn't.

Q Did you contact Mr. Fisher with respect to these work papers and ask that he return them to you?

[49]

A I contacted Mr. Goldsmith and told him that I would like to get the papers back, that I was requested by the Government to bring them to their offices.

Q Did you, do you recall a conversation with Special

Agent Feldman on the telephone on November 3, 1971?

A Try to refresh my memory. I really couldn't tell you at this moment.

Q That was the return date of the summons that was served upon you?

A Yes, I remember he did call me in the afternoon. I had been in the office at the time specified and he wasn't there. The supervisor told me he was on another assignment, but he would contact me later to explain why he did not meet me, not realizing I was going to be there that day.

Q I see, and in the course of that telephone conversation did you advise him you had attempted to get the papers from Mr. Fisher and whenever you raised that question with him he avoided the question?

THE COURT: I don't understand that question and I am sure the witness does not. Would you rephrase it.

BY MR. SCULLY:

Q During the course of your telephone conversation with Special Agent Feldman did you advise him that you had contacted Mr. Fisher and requested that he return the work papers to you and [50] that when you brought the subject up to Mr. Fisher he would not give you a direct answer or avoided the question?

A I do not remember that. I remember telling him I did not have the records, but I don't remember what other conversation occurred at that time.

Q I see. Do you keep a record of the date that you turn over papers that are retained in your office to the specific client?

A Not as a rule. Records are returned periodically to all clients, and if we had to keep track of each one, it makes it awkward because I may or may not be there at the time they pick up the records.

Q When you returned the work papers in question here

to Mr. Goldsmith in the first part of August, I believe you said, did this cover only 1969 and 1970 or were there other years involved?

A There were other years involved. I gave him any papers I had up to that point.

Q Do you recall how far back they went?

A They may have gone back to 1959.

Q So that would be approximately eleven years of work papers were in your possession?

A Whatever was in that work folder.

Q And those were not returned to Mr. Goldsmith until August of 1971?

[51]

A The 4th or 5th of August, I would think, is an estimate at this point.

MR. SCULLY: Thank you, sir. I have no more questions.

CROSS EXAMINATION

BY MR. FISHER:

Q Mr. Berson, you testified that you have known Mr. and Mrs. Goldsmith for approximately twenty-five or thirty years, is that correct?

A That's right.

Q How long have you performed accounting services for them?

A At least twenty-five years.

Q Now, if we can, let's limit ourselves. When I refer to accounting papers here, let's limit ourselves to the cash receipts and cash disbursements records that are the items referred to in the summons. Have you seen the summons which was issued? I will show you exhibit number G-2. Would you look at items one and three please?

A Yes.

Q And they refer to cash receipts and cash disbursements

records of Morris Goldsmith and Sally Goldsmith, is that correct?

A Right.

Q Now, in the accounting profession, Mr. Berson, who normally [52] physically makes the entries in the cash receipts and cash disbursements records?

A Usually the client.

Q Are there some cases where rather than have the client do it the accountant does it?

A When arrangements have been made with the client for that service to be done in addition to the regular work.

Q Now, in this particular case your office under your direction did the keeping of the cash receipts and the cash disbursements records, is that correct?

A Yes.

Q And with respect to those records only, Mr. Berson, did you have any understanding over the years who those records belonged to, whether they belonged to you or whether they belonged to the Goldsmith's?

A They would belong to the client.

Q And that was always your understanding for twenty-five or thirty years?

A A detail of cash receipts, cash disbursements and general ledgers belonged to the client.

Q And it was your custom, would you explain to the Court what, in terms of time, how often you returned those papers to the client and here, specifically, to Mr. and Mrs. Goldsmith?

[53]

A Of course, the cancelled checks and the bills would have been returned immediately at the end of the year. The cash receipts and disbursements as a rule are also returned immediately, but the ledgers were held for a period of four or five years until we had the city audits. City audits usually cover five or six year periods and to make it more convenient to represent the client we usually accumulate them until we have an audit,

at the end of which time we would return the ledgers to the client.

Q Would it be your testimony then in this particular case that every five or six years after you had your city audit you returned the records to the client?

A That's right.

Q So when the Government on direct examination indicated that you were returning perhaps eleven years worth of records in August of 1971 was that a correct statement or would it be an incorrect statement?

A That is not correct because eleven years of records would be in my folder would be partially their records and partially mine.

Q But the items referred to in the summons that I just had you examine—

A Were only for the last two or three years.

Q And all the years prior to that you would have previously delivered to Mr. and Mrs. Goldsmith?

A They would have been delivered before.

[54] MR. FISHER: Try and wait until I finish the question because the reporter cannot get it if we both talk at the same time.

THE COURT: Wait until he finishes a question before you answer it.

BY MR. FISHER:

Q Would you say, Mr. Berson, that the preparation of the tax return on one hand and the preparation of the cash receipts and cash disbursements records on the other are two separate functions?

A Yes.

Q Now, assuming that Mr. Goldsmith had not come to you on or about August 3rd, 4th, or 5th, 1971 and requested those records from you at that time, would you have in the normal course of events given it to him anyhow?

A Yes, I would.

Q And so, therefore, with respect to those records described in the summons under items one and two you regarded those as your client's papers rather than your own?

A Yes.

Q And any time the client had requested the delivery of them you would have delivered them to him?

A That's correct.

Q And when you delivered them to him, as far as you are concerned, [55] he always had ownership rights and after you had delivered them he continued to have ownership rights?

A Yes.

Q And when you retained them for the short period you did, that was always for a matter of convenience so you would have them in case of a tax examination?

A That's right.

MR. FISHER: No further questions.

REDIRECT EXAMINATION

BY MR. SCULLY:

Q Mr. Berson, when Special Agent Feldman visited you on October 22, 1971 what work papers did you have in your possession at that time?

A None.

Q You had no work papers in your possession?

A No.

Q Now, when Special Agent Feldman called at your office was he not also accompanied by Special Agent John Bell?

A That's right.

Q And did you not at that time tell both Special Agent Feldman and Special Agent Bell that you had work papers relating to the cash return prepared for Morris and Sally Goldsmith for the years 1969 and 1970 in your possession?

[56]

A No, not that I can recall.

Q And did you not also tell them that those records and work papers were your property?

A I don't remember mentioning that in any definite status as to who they belonged to.

Q You don't remember that?

A No, I don't.

Q Is your testimony here today that you did not, as I understand your testimony here today, then you are stating you did not have any work papers in your possession at that time?

A At the time when the agents came in the first time?

Q Yes.

A There was no records in the office at that time, either mine or the clients that I was holding for them.

Q And prior to that time what work papers of yours did you have in your possession prior to the time the records were turned over to Mr. Goldsmith?

MR. FISHER: If your Honor please, I would like to object at this time. The only issue in this case is the enforcement of a summons calling for the cash receipts and cash disbursements records, and no other records, and I would think we ought to limit ourselves to the records which are the subject of the summons.

THE COURT: You have heard the limitation request [57] made by Mr. Fisher?

MR. SCULLY: Yes, your Honor.

THE COURT: Do you have anything to say about it?

MR. SCULLY: Your Honor, I believe that Mr. Berson's characterization of these particular documents as work papers or not work papers and as his property or the taxpayer's property is not conclusive and not binding on the Court.

MR. FISHER: I agree it is not necessarily conclusive,

although it is the Government's witness who is now testifying, your Honor, and all I am suggesting is that we limit ourselves to the subject matter of the summons.

Now, I think you might want to ascertain what he means by cash receipts and cash disbursements, but I don't like the use of terms that are not mentioned in the summons because I don't know what the Government is talking about.

THE COURT: I think that is a proper criticism. Will you limit yourself, please?

MR. SCULLY: Yes, sir.

BY MR. SCULLY:

Q Mr. Berson, what was the purpose of preparing the cash receipts and disbursements records on 1969 and 1970?

A Basically they wanted to determine what their profit was for the year and from those records we would get the totals that we [58] need to prepare returns for them, Federal and City.

Q Prepare their tax returns?

A That's right.

Q Now, in the preparation of these tax returns did you or your firm prepare any work papers other than these analyses of disbursements and receipts?

A In the case of Sally Goldsmith we have a complete set of records and after the end of the year we would have our trial balances and journal entries and follow through to the year end P and L which would be considered accountant's records.

As far as Morris's return was concerned, all we did was take figures from his deposits for the year and his checks issued for the year. He did not have a complete set of books as Sally did. His type of operation didn't warrant that type of record-keeping. We would take a summary of his receipts and disbursements and obtain figures from that and use those in arriving at the income and expense he had for the year.

Harold Berson—Redirect

Q Was there any purpose for this other than preparing his tax returns?

A Well, we had discussed the profit he would show. It is interesting to know whether or not it paid to stay in business.

Q Now, if we can clarify a statement you made a little earlier with respect to what records were in your possession dating back to 1959, would you tell me what records you were referring to at [59] that point?

A In our work folders we keep certain detail that we accumulate over the years for information that we would need at the end of the year. There may be bank reconciliations going back to 1959. Only one sheet was needed for that because it was done only once a year. We would have maybe copies of who the employees were at any one particular time. There is an accumulation of papers that you have in a folder. It doesn't warrant making a new folder each year. There is not that much detail. It depends on who the client is. From 1959 on there may have been payments made on loans that we had kept separate records of. So that it gets pretty bulky after a while and, when he needed these records, we gave the entire folder to him, not picking out anything individually.

Q Now, as a result of your analysis of the receipts and disbursements that you prepared for 1969 and 1970, did you prepare a report and submit it to Mr. Goldsmith or Mrs. Goldsmith?

A There was no written report given to them. We just used those figures in arriving, after discussing with them the profit that it showed and analyzing with then certain items that may not have made sense at the time that we had accumulated it. We prepared his tax return. All he would get is his tax return that would show what he did for the year and, of course, he got his cancelled checks back.

Q And when were the cancelled checks returned to him?

Harold Berson—Redirect

[60]

A When he got up to the office to get them. Sometimes a couple of years would accumulate before we would be able to get it back to him.

Q On every occasion are the papers that are retained in your file returned to the taxpayer or are they sometimes destroyed rather than returned?

A Sometimes they are destroyed when certain clients don't want to accumulate the records themselves. After a five or seven year period then we would destroy any records we had before then.

Q I will ask you one more time to just get this clear in my mind whether the tax returns that you prepared for 1969 and 1970 were based on the analysis of receipts and disbursements that you also prepared for those years?

A Yes.

Q And nothing else?

A I don't understand your question.

Q Did you prepare anything else other than the analysis of receipts and disbursements to enable you to complete the tax returns?

A We prepared records from the sources of information in order to accumulate information needed for the return. Now what other information would you require for the return if it wouldn't be from that information?

Q That is what I am asking you. If there was anything more than [61] the analysis of the receipts and disbursements?

A In Sally Goldsmith's records we have a complete ledger. The posting is done through a general ledger. It is more than just an analysis. An analysis of receipts and disbursements is just a writing up of the receipts and disbursements, of what occurred during the year. You would have to total them in order to get figures to put on the return.

Q I see. Is this ledger drawn up through the use of the analysis that you prepared?

A The ledger is posted monthly. If a place of business has a regular bookkeeper there they would do the same thing. Day to day they would write in the receipts and post a general ledger. In our case we had somebody that we would hire to write the records up and post for the year for Sally Goldsmith. For her we had a complete set of books. Morris, being the type of operation he has, we just took the summary at the end of the year.

Q And in connection with Sally Goldsmith was there any report of any kind given to her at the end of each year?

A There may have been statements given to her at the end of the year if she had to go to a bank or somewhere else for credit.

MR. SCULLY: I have no more questions, your Honor.

THE COURT: Recross.

RECROSS EXAMINATION

[62] BY MR. FISHER:

Q Just about two minutes, Mr. Berson. In the accounting profession does the term work papers have a meaning separate and distinct from the terminology cash receipts and cash disbursements records?

A Definitely.

Q And the records you returned to the taxpayers, the records you returned periodically to the taxpayer were of which class?

A Cash receipts and disbursements.

Q When you use the date 1959, do you know as a fact the records went back as far as 1959 or are you speculating?

A I am speculating because I think I noticed some papers in there one time that went back to 1959.

Q As a matter of fact, Mr. Berson, don't tax returns contain information other than the income and expenses of the business?

A Yes, they do.

Q For example, in tax returns you report dividends you receive, interest which you receive?

A That's right.

Q And capital gains which you may receive?

A Right.

Q And don't you deduct a number of different kinds of deductions, [63] interest, contributions, medical expenses, a lot of things other than business expenses?

A That's right.

Q So that in order to prepare a tax return you need things other than the profit and loss figures?

A That's right.

Q As a matter of fact, can't you prepare a tax return just based upon a profit and loss statement that a client might bring you which he himself prepared from his own books?

A Possible.

Q And you can base your tax return just on those totals rather than all of the detail, is that correct?

A It's possible.

Q As a matter of fact, don't you know, Mr. Berson, that Morris and Sally Goldsmith used the figure which came from the cash receipts and cash disbursements records in order to make bank loans?

A Yes, they did.

Q And that they were used for the purpose of determining whether their business was being operated on a profitable basis and what the mark-up was?

A That's correct.

Q And these are the normal purposes that businesses use their [64] financial records for in addition to preparing their tax returns?

A That's correct.

MR. FISHER: No further questions.

THE COURT: Mr. Scully?

MR. SCULLY: Nothing more, your Honor.

THE COURT: Thank you very much, Mr. Berson.
(Witness leaves stand.)

THE COURT: Your next witness.

MR. SCULLY: The Government has nothing more, your Honor.

THE COURT: The Government has rested, Mr. Fisher. Your witness please.

MR. FISHER: Yes, sir. If the Government prefers, I can do this through the witnesses, but they will corroborate the turning over of the records, the history by Mr. Berson, and they will also claim the Fifth Amendment. That is the only purpose for which I intend to put Mr. and Mrs. Goldsmith on the stand and, if the Government would stipulate they would so do it, I think that would terminate the case, sir.

THE COURT: Mr. Scully?

MR. SCULLY: I don't want to prolong this proceeding past four o'clock, but I have no way of knowing what the Goldsmiths will testify to.

THE COURT: Well, if you can't stipulate on the [65] statements that Mr. Fisher has made, then you would want to hear the witnesses.

MR. SCULLY: That's correct, your Honor.

MR. FISHER: I call Morris Goldsmith.

MORRIS GOLDSMITH, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FISHER:

Q Mr. Goldsmith, you have heard Mr. Berson testify today?
A Yes.

Q When he recited to you that history of—strike that. When he recited the history of turning over the records, do you know of your own knowledge whether his recitation was true and correct?
A Yes.
Q Was it true and correct, sir?
A It was true.
Q With respect to the cash receipts and cash disbursements records for your business did you regard them as your property or Mr. Berson's property?
A I would regard them as my property.
Q Did you have an understanding or agreement with Mr. Berson that they were your property?

[66]

A I say yes because for the last thirty years that he has been keeping my books they have been returned to me.
Q And any time you asked for them you were given them?
A Many times Mr. Berson would ask me to come and please take them because he didn't have room.
Q All right. And those records which you delivered to me, Mr. Goldsmith, did you deliver them to me in connection with obtaining legal advice?
A Yes.
Q With respect to those records to the extent that you have a privilege under the Fifth Amendment and a privilege of confidential communication with your attorney, do you claim that privilege, sir?
A Yes.

MR. FISHER: No further questions.

CROSS EXAMINATION

BY MR. SCULLY:

Q Mr. Goldsmith, would you tell me what the substance of that agreement between yourself and Mr. Berson is with respect to the cash receipts and disbursements analysis?

A I submit them to Mr. Berson and from that he determines my tax. I have been doing this for the last twenty-five, thirty years.

Q I see. And do you have a written agreement with Mr. Berson with respect to whose property these records will be after they [67] prepared.

A No, sir.

Q Have you ever discussed it with him other than just the fact that it has always been that way?

A It has always been that way. As I say, many times he has called me and asked me to please take my records back.

Q I see. But he didn't call you and ask you to take these records back during the first part of August, 1971, did he?

A No.

Q You called him, did you not?

A Yes.

Q And asked for the records?

A Yes.

Q And why did you ask him for the records?

A On advice of my counsel.

Q And this was after you had been contacted by Special Agent Feldman, had you not?

A I actually was never contacted. I never met Mr. Feldman. I spoke to someone on the phone who said they wanted to meet me or—I never met Mr. Feldman.

Q Let the record show I am not attempting to ask him whether he ever met Mr. Feldman. I am asking whether you were contacted by Special Agent Feldman by telephone?

A No, I was not contacted.

[68]

Q You did not arrange to meet with Special Agent Feldman on August 3, 1971?

A I did not. I called Mr. Feldman and he asked me either to meet with him or for my records and I referred him to Mr. Fisher.

Q But you do recall speaking with Mr. Feldman?

A I do vaguely. I am not sure. I will be very honest with you. I am not sure. My wife told me that they had been to the store and a number was left and I called that number and that was the first time that I knew what was going on.

Q And what was your impression of what was going on?

MR. FISHER: I will object to that, your Honor.

THE COURT: Objection sustained.

MR. SCULLY: I have nothing more, your Honor.

THE COURT: Thank you. Any redirect, Mr. Fisher?

MR. FISHER: Just one question.

REDIRECT EXAMINATION

BY MR. FISHER:

Q Mr. Goldsmith, did you use your financial information that Mr. Berson prepared for purposes other than for the preparation of your tax return?

A No.

Q Did you ever make any bank loans?

A Oh, yes, when it was necessary if I needed a profit and loss [69] statement I would take that into the bank. Yes, I misunderstood you.

MR. FISHER: Thank you.

THE COURT: What business are you in, Mr. Goldsmith?

MR. GOLDSMITH: I am in the textile waste business, sir.

THE COURT: Textile waste?

MR. GOLDSMITH: Yes, that is the by products of the manufacturers that cut materials, cloth.

THE COURT: Thank you.

MR. FISHER: That's all, Mr. Goldsmith.
(Witness leaves stand.)

MR. FISHER: Mrs. Goldsmith.

SALLY GOLDSMITH, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FISHER:

Q Mrs. Goldsmith, were you in court when Mr. Berson testified?
A Yes.
Q And you heard Mr. Berson recite the history of periodically returning to you your cash receipts and cash disbursements records?
A Yes, I did.
Q Is that true and correct?
A It is very true.

[70]

Q Did you use the information obtained from those cash receipts and cash disbursements for purposes other than the preparation of your tax return?
A Yes, to make loans.
Q Did you also use it in determining the mark-up in your business and your profitability and so on?
A Yes, I did.
Q Did you have those records delivered to me with respect specifically to the years 1969 and 1970 in order to obtain legal advice from me?
A Yes, we did.
Q With respect to those records which you turned over to me to the extent you have a right to claim a privilege under the Fifth Amendment and confidential communications between attorney and client, do you claim them?

A Yes, I do.

MR. FISHER: May we have one moment, your Honor?
(Defense counsel confer.)

MR. FISHER: You may cross examine.

THE COURT: What business are you in, Mrs. Goldsmith?

MRS. GOLDSMITH: I have a women's wear shop.

THE COURT: Where?

MRS. GOLDSMITH: 915 Snyder Avenue.

MR. SCULLY: No questions, your Honor.

[71] THE COURT: Thank you very much.

MR. FISHER: You may step down, Mrs. Goldsmith.
(Witness leaves stand.)

MR. FISHER: We have no further witnesses, your Honor.

MR. SCULLY: We have nothing more, your Honor.

THE COURT: I will expect a brief from both sides in this case before I decide it and suppose we say a brief in a week?

MR. FISHER: Can we wait until the transcript is available, your Honor? I think we have a factual question to be determined and I think references to this record would be very helpful.

MR. SCULLY: I would also like the transcript.

THE COURT: All right. The brief will be presented to this Court within one week after the transcript of testimony and are you two ordering the transcript of the testimony?

MR. FISHER: We will, your Honor.

Adjournment

MR. SCULLY: Yes, your Honor.

THE COURT: All right. I don't know which one of you gentlemen would be required to file your brief first. Do you mind letting me know what your choice is in the matter?

[72] MR. FISHER: I can see no reason why we can't file simultaneous briefs within ten days after the record is available.

THE COURT: Suppose we make it two weeks from the date of receiving the transcript. I will expect it then and I certainly need the law briefed on this particular case. So I will expect to hear from you.

NOW, 4:10 P.M., Court adjourns.

Reported by:
Elizabeth P. Mensch

[73]

INDEX

Government Witnesses	*Direct*	*Cross*	*Redirect*	*Recross*
Alan Morris Feldman	11	21	40	41
Harold Berson	43	51	55	62
Defense Witnesses				
Morris Goldsmith	65	66	68	
Sally Goldsmith	69			

EXHIBITS

Government Exhibits	*For Id.*	*In Evid.*
G-1 Summons—Harold Berson	14	15
G-2 Summons—Solomon Fisher	17	18

Summons

Department of the Treasury
Internal Revenue Service

INTELLIGENCE DIVISION
P. O. BOX 12914
PHILA. PA. 19108
PHONE #597-2255

In the matter of the tax liability of

MORRIS GOLDSMITH
Internal Revenue District of Philadelphia
Period(s) 1968, 1969, 1970

THE COMMISSIONER OF INTERNAL REVENUE

To Harold Berson, C.P.A.
Suite 106 Rydal West
At Jenkintown, Pa.

Greetings: You are hereby summoned and required to appear before Alan M. Feldman an officer of the Internal Revenue Service, to give testimony relating to the tax liability or the collection of the tax liability of the above named person for the period(s) designated and to bring with you and produce for examination the following books, records, and papers at the place and time hereinafter set forth:

Address: 4641 Pine Street, Phila. Pa.

1. All workpapers, permanent files, account analysis, and correspondence.
2. All tax returns, and backup information used to prepare said returns.
3. All of the following information in your possession:
   a. Cash Receipts book
   b. Cash Disbursements
   c. Check Disbursements
   d. General Journals
   e. Subsidiary Ledgers
   f. Accounts Receivable Ledgers
   g. Accounts Payable Ledgers
   h. Bank Statements
   i. Canceled Checks
   j. Bank Deposit Slips
4. Copies of payroll tax returns for the above years.

PLACE AND TIME FOR APPEARANCE: at Room 752, 401 North Broad Street, Philadelphia, Pennsylvania, 19108 on the 3rd day of November, 1971 at 10:00 o'clock A.M.

Failure to comply with this summons will render you liable to proceedings in the district court of the United States or before a United States commissioner or magistrate to enforce obedience to the requirements of this summons, and to punish default or a disobedience.

Issued under authority of the Internal Revenue Code
this 22nd day of October, 1971.

Original

Alan M. Feldman /s — Signature

SPECIAL AGENT — Title

(Certificate of Service of Summons Omitted in Printing.)

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, and
ALAN M. FELDMAN, *Special Agent,*
Internal Revenue Service,
Petitioners

Misc. No. 72-18

v.

SOLOMON FISHER,
Respondent.

Filed: Mar. 1, 1972

ORDER

AND NOW, this 8th day of March, 1972, upon consideration of the Amended Petition To Intervene of Morris Goldsmith and Sally Goldsmith and of the memoranda and argument submitted thereon it is hereby ORDERED that the Amended Petition To Intervene is granted and the said Morris Goldsmith and Sally Goldsmith are hereby made parties to this proceeding.

John Morgan Davis, J.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(Caption Omitted in Printing)

PROPOSED FINDINGS OF FACT OF RESPONDENTS

1. Over the course of approximately twenty-five years in which accountant Berson performed services for the Goldsmiths, analyses of cash receipts and disbursements were regularly given to the Goldsmiths for their permanent possession within several years of their preparation.

2. Accountant Berson does not desire or expect the return to him of the records sought by the government.

3. The possession by the Goldsmiths or their attorney of the records sought by the government is and at all times was consented to by accountant Berson.

4. Cash receipts and cash disbursements records are usually kept by the accountant's client.

5. Cash receipts and cash disbursements records are important for businesses to have for such purposes as determining profit, setting prices, and obtaining financing.

6. An understanding existed between accountant Berson and the Goldsmiths that analyses of cash receipts and cash disbursements belonged to the Goldsmiths.

7. Analyses of cash receipts and cash disbursements are not accountant's work papers.

8. The Goldsmiths gave the records sought by the government to their attorney, respondent Fisher, for legal advice, and the records have been used for that purpose.

9. Special Agent Feldman is part of the Intelligence Division of the Internal Revenue Service, and is not part of any other division, including the Audit or Collection Division.

10. There is no representative from any other division assigned to the Goldsmith investigation.

/s/ Solomon Fisher
SOLOMON FISHER
RICHARD L. BAZELON
2600 The Fidelity Building
Philadelphia, Penna. 19109

Attorneys for Respondents

Of Counsel:

DILWORTH, PAXSON, KALISH,
LEVY & COLEMAN

Dated: June 2, 1972

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA and
ALAN M. FELDMAN, *Special Agent,*
Internal Revenue Service

v.

SOLOMON FISHER

Misc. No. 72-18

ORDER

DAVIS, J.

AND NOW, this 31st day of August, 1972, it is hereby ORDERED that the time for Respondent to comply with the Court's Order of August 4, 1972, is extended to October 4, 1972.

BY THE COURT.

JOHN MORGAN DAVIS, J.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA and
ALAN M. FELDMAN, *Special Agent,*
Internal Revenue Service,
Petitioners,

v.

SOLOMON FISHER,
Respondent,

and

MORRIS GOLDSMITH and
SALLY GOLDSMITH,
Intervenors.

Misc. No. 72-18

ORDER

AND NOW, this 29th day of September, 1972 it is hereby ORDERED that the Order of August 4, 1972 is stayed pending final determination by the United States Court of Appeals of the appeal from the said Order.

JOHN MORGAN DAVIS, J.

Supreme Court, U. S.
FILED
DEC 2 1974
MICHAEL RODAK, JR., CLERK

No. 74-18

In the Supreme Court of the United States

OCTOBER TERM, 1974

SOLOMON FISHER, MORRIS GOLDSMITH AND SALLY GOLDSMITH, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-18

SOLOMON FISHER, MORRIS GOLDSMITH AND SALLY GOLDSMITH, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

The question raised by the petition is whether the Fifth Amendment privilege against self-incrimination may be invoked as a ground for refusal to comply with an internal revenue summons requiring the production of an accountant's workpapers relating to the preparation of the claimant's prior tax returns where, upon their becoming aware that the claimant was the subject of a tax investigation, the accountant handed over the papers to the claimant, who then turned them over to his attorney.

1. The facts are not in dispute. In July 1971, Alan M. Feldman, a special agent of the Intelligence Division of the Internal Revenue Service, spoke with petitioner Morris Goldsmith and made an appointment with him to discuss his tax liability. On August 3, 1971, Goldsmith and his wife retained petitioner Solomon Fisher, an attorney, to represent them, and Fisher called Feldman and advised him that his client Goldsmith would not appear for the appointment. On or about August 5, 1971, the Goldsmiths obtained from their accountant certain records compiled by the accountant in connection with his preparation of their tax returns. These records, some of which dated as far back as 1959, were essentially lists of income and expenses compiled by the accountant from cancelled checks and deposit receipts supplied by the Goldsmiths. On August 17, 1971, the Goldsmiths turned these records over to Fisher (Pet. App. B, A10-A11).

Subsequently, Special Agent Feldman served an internal revenue summons upon the accountant seeking production of the records relating to the Goldsmiths' income and disbursements. The accountant appeared and reported that he did not have the documents in question. Thereafter, the agent served a summons upon petitioner Fisher, directing production of the records prepared by the accountant which had been transmitted to him by the Goldsmiths. Upon his refusal to permit inspection of the records, this enforcement action was commenced in the United States District Court for the Eastern District of Pennsylvania (Pet. App. B, A11-A12).

After a hearing, the district court ordered enforcement of the summons. The court further found that the records sought were owned by the accountant and rejected petitioners' claimed Fifth Amendment privilege (Pet. App. A, A1-A7). In an *en banc* decision, with one judge concurring in part and dissenting in part, the court of appeals affirmed (Pet. App. B, A8-A44).

2. The decision below upholds the enforcement of an internal revenue summons requiring the production by an attorney of an accountant's workpapers which were turned over to the attorney by the clients after they obtained them from the accountant. The papers at issue related to the accountant's preparation of past tax returns of the client and were given to the attorney after the commencement of a tax investigation of the client. In these circumstances, the courts below correctly concluded that the clients' Fifth Amendment privilege could not be invoked as a bar to compelling the attorney to produce the summoned accountant's workpapers.[1]

In *Couch* v. *United States,* 409 U.S. 322, this Court reaffirmed that the Fifth Amendment privilege against self-incrimination is an intimate and personal right. While the privilege had been held to cover books and records in *Boyd* v. *United States* 116 U.S. 616, the Court has explicitly limited the scope of the claim in those circumstances to private papers. Thus, in *Couch* v. *United States, supra,* 409 U.S. at 330, n. 10, the Court observed that "[a] later Court commenting on the *Boyd* privilege noted that 'the papers and effects which the privilege protects must be the private property of the person claiming the privilege, or *at least in his possession in a purely personal capacity.' United States* v. *White,* 322 U.S. 694, 699 (1944). (Emphasis added.)" See also *Bellis* v. *United States,* No. 73-190, decided May 28, 1974, slip op. 5.

---

[1]Because the claimants, Morris and Sally Goldsmith, intervened in this summons enforcement proceeding, the courts below did not have to address the question whether an attorney can raise a Fifth Amendment claim on behalf of his client. Compare *Bouschor* v. *United States,* 316 F. 2d 451 (C.A. 8), with *United States* v. *Judson,* 322 F. 2d 460 (C.A. 9). See also *United States* v. *Kasmir,* 499 F. 2d 444, 454-455 (C.A. 5), pending on the government's petition for a writ of certiorari, No. 74-611.

In *Couch* v. *United States, supra,* the Court held that where the owner of books and records transferred them to an accountant, she could not invoke the privilege as a bar to the compelled production of the records by the accountant. Since the claimant of the privilege in *Couch* did not have possession of the records in question, the Court concluded that "the ingredient of personal compulsion against an accused is lacking" (409 U.S. at 329).

While *Couch* emphasized the absence of possession of the summoned documents by the claimant, the decision below correctly held that the taxpayers' brief possession of the papers was insufficient to establish the requisite constructive possession of them for purposes of the privilege against self-incrimination. As the court of appeals observed, the taxpayers' possession of the papers was "fleeting and transitory, limited to the act of delivery from the accountant's office to the office of their lawyer" (Pet. App. B, A24). Compare *United States* v. *White,* 477 F. 2d 757 (C.A. 5), affirmed *per curiam en banc,* 487 F. 2d 1335 (C.A. 5), certiorari denied, October 15, 1974, No. 73-1308. Here, the summoned workpapers were not the private papers of the taxpayers, for they originated with and belonged to their accountant. If anyone remained in constructive possession of the papers after their transfer to the attorney, it was the accountant (who could be required to authenticate and testify about them) rather than the taxpayers. Compelled production by the attorney of the accountant's papers in these circumstances does not constitute the "extortion of information from the accused himself that offends our sense of justice" (*Couch* v. *United States, supra,* 409 U.S. at 328). As Mr. Justice Holmes admonished for a unanimous Court in *Matter of Harris,* 221 U.S. 274, 279-280, "The right not to be compelled to be a witness against oneself is not a right to appropriate property that may tell one's story."

3. Subsequent to the decision below, the Fifth Circuit rendered its opinion in *United States* v. *Kasmir,* 499 F. 2d 444, pending on the government's petition for a writ of certiorari, No. 74-611. There, on closely parallel facts, that court held, with one judge dissenting, that the Fifth Amendment privilege was available to bar production of an accountant's workpapers which, after the commencement of a tax investigation, were transferred to the taxpayer who turned them over to his attorney.[2] There is therefore a square conflict of decisions between two circuits on an issue which is of major importance to the conduct of federal tax investigations. Accordingly, we do not oppose the granting of the petition for a writ of certiorari.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1974.

---

[2]Petitioners set forth the *Kasmir* opinion at pages A1-A22 in the appendix to a supplemental brief in support of the petition. A copy of the government's petition for a writ of certiorari in *Kasmir* has been served on the respondents in this case. We have asked the Court to grant certiorari in *Kasmir* or alternatively, to hold the case pending the disposition in this case.

DOJ-1974-11

Supreme Court, U. S.
FILED
APR 17 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-18

SOLOMON FISHER
and
MORRIS GOLDSMITH and SALLY GOLDSMITH,
Intervening Parties, Petitioners

v.

UNITED STATES OF AMERICA and
ALAN M. FELDMAN, Special Agent,
Internal Revenue Service, *Respondents*

BRIEF FOR PETITIONERS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

RICHARD L. BAZELON
SOLOMON FISHER
2600 The Fidelity Building
Philadelphia, Pa. 19109

Of Counsel:
DILWORTH, PAXSON, KALISH
& LEVY

THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107

TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	1
Statutory and Constitutional Provisions Involved	1
Questions Presented	2
Statement of the Case	3
Summary of Argument	6
Argument:	
A. The Taxpayers Could Not Have Been Compelled to Produce the Records Identified in the IRS Summons Had They Retained Possession of Those Records	9
1. Taxpayers Held the Records in Question, Concerning Their Personal Financial Affairs, in a Personal Capacity Before Delivering Them to Their Attorney for the Purpose of Obtaining Legal Advice	9
2. A Private Citizen Who Holds Incriminating Records Concerning His Personal Financial Affairs Cannot Be Compelled to Produce Those Records	11
3. Had Taxpayers Not Delivered the Summaries to Their Attorney, They Could Not Have Been Compelled to Produce Them Without Violation of Their Fifth Amendment Privilege	17
B. The Taxpayers Did Not Forfeit Their Fifth Amendment Rights by Turning Over the Summaries to Their Attorney to Obtain Legal Advice in Connection with the Criminal Investigation Being Made of Them	23

Page

1. Taxpayers Exercising Their Right to Retain Counsel in a Criminal Investigation Cannot Thereby Be Deprived of Their Fifth Amendment Privileges 23
2. Taxpayers Have Constructive Possession of Records in the Custody of Their Attorney Which They Delivered to Him to Obtain Legal Advice in Connection with a Criminal Investigation Being Made of Them 25

Conclusion 28

TABLE OF CITATIONS

Cases:

Accardi, United States *ex rel.* v. Shaughnessy, 347 U.S. 260 (1954) 22

Application of House, 144 F.Supp. 95 (N.D. Cal. S.D. 1956) 20, 21

Bellis v. United States, 417 U.S. 85 (1974) 12, 14, 15, 17, 18

Bouscher v. United States, 316 U.S. 451 (8th Cir. 1963) 26

Boyd v. United States, 116 U.S. 616 (1886) ... 6, 11, 12, 18

Brody v. United States, 243 F.2d 378 (1st Cir. 1957), *cert. denied*, 354 U.S. 923 26

California Bankers Association v. Shultz, 416 U.S. 21 (1974) 19

California v. Byers, 402 U.S. 424 (1971) 20

Cohen v. United States, 388 F.2d 464 (9th Cir. 1967) 20, 21

Cases:

Page

Colton v. United States, 306 F.2d 633 (2nd Cir. 1962), *cert. denied*, 371 U.S. 951 (1963) 26

Couch v. United States, 409 U.S. 322 (1973) 6, 11, 14, 15, 16, 17, 24, 25, 26

Curcio v. United States, 354 U.S. 118 (1957) 14

Deck v. United States, 339 F.2d 739 (D.C. Cir. 1964) .. 20

Donaldson v. United States, 400 U.S. 517 (1971) ... 10, 14

Entick v. Carrington, 19 Howell, St. Tr., 1029; 95 Eng. Rep. 807 (K.B. 1765) 11, 12

Escobedo v. Illinois, 378 U.S. 478 (1964) 7, 23

Fahey, In Re, 300 F.2d 383 (6th Cir. 1961) 26

Gardner v. Broderick, 392 U.S. 273 (1968) 7, 24

Gilbert v. California, 388 U.S. 263 (1967) 14

Grant, In re, 198 F.708 (S.D.N.Y. 1912) *aff'd* 227 U.S. 74 (1913) 20

Grosso v. United States, 309 U.S. 62, 68 (1968) 18, 20

Haynes v. United States, 390 U.S. 85 (1968) 18, 20

Hill v. Philpott, 445 F.2d 144 (CA7), *cert. denied*, 404 U.S. 991 (1971) 18

Jones v. United States, 362 U.S. 257 (1960) 15

Katz v. United States, 389 U.S. 347 (1967) 15

Kirby v. Illinois, 406 U.S. 682 (1972) 23

Leary v. United States, 395 U.S. 6 (1969) 18, 20

Maness v. Meyers, 43 U.S.L.W. 4143 (U.S. Jan. 15, 1975) 7, 14, 15, 23, 24

Marchetti v. United States, 390 U.S. 39 (1968) 18, 20

Miami-Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) 24

Cases: Page

Miranda v. Arizona, 384 U.S. 436 (1966) 24
Murdock v. Pennsylvania, 319 U.S. 103 (1943) 24
Olmstead v. United States, 227 U.S. 438 (1928) 12
Schmerber v. California, 384 U.S. 757 (1966) ... 12, 13, 14
Service v. Dulles, 354 U.S. 363 (1959) 22
Shapiro v. United States, 335 U.S. 1 (1948) 18
Shelton v. Tucker, 364 U.S. 479 (1960) 24
Silverman v. United States, 365 U.S. 505 (1961) 15
Speiser v. Randall, 357 U.S. 513 (1958) 24
Spevack v. Klein, 385 U.S. 511 (1967) 7, 18, 24
Talley v. California, 362 U.S. 60 (1960) 24
Tehan v. Scott, 382 U.S. 406 (1966) 19
Uniform Sanitation Men Association v. Commissioner of Sanitation, 392 U.S. 280 (1968) 7, 24
United States v. Calandra, 414 U.S. 338 (1974) 12
United States v. Cohen, 388 F.2d 464 (9th Cir. 1967) . 6, 7, 8, 16, 19, 20
United States v. Dionsio, 410 U.S. 1 (1973) 12, 13
United States v. Egenberg, 443 F.2d 512 (3d Cir. 1971) .20
United States v. Fisher, 500 F.2d 683 (3d Cir. 1974), *cert. granted*, 43 U.S.L.W. 3412 (U.S. Jan. 27, 1975) (No. 74-18) 18, 19
United States v. Foster, Lewis, Langley & Onion, 65-1 U.S. Tax Cases ¶9418 (W.D. Tex. 1964) 20, 21
United States v. Heffner, 420 F.2d 809 (4th Cir. 1969) 11, 22
United States v. Judson, 322 F.2d 460 (9th Cir. 1963) 8, 26, 27

Cases: Page

United States v. Kasmir, 499 F.2d 444 (5th Cir. 1974), *cert. granted*, 43 U.S.L.W. 3412 (U.S. Jan. 27, 1975) (No. 74-611) 7, 8, 11, 19, 26
United States v. Leahey, 434 F.2d 7 (1st Cir. 1970) .. 11, 22
United States v. Nixon, 418 U.S. 683 (1974) 10, 11, 22
United States v. White, 322 U.S. 694 (1944) 6, 15, 26
United States v. White, 487 F.2d 1335 (5th Cir. 1973), *cert. denied*, 43 U.S.L.W. 3212 (U.S. Oct. 15, 1974) .26
United States v. Zakutansky, 410 F.2d 68 (7th Cir. 1968, *cert. denied*, 393 U.S. 1021 ..... 11, 20
Warden v. Hayden, 387 U.S. 297 (1967) 13, 15
Wilson v. United States, 221 U.S. 361 (1911) 15, 18

Statutes and Regulations:

Internal Revenue Code of 1954 (26 U.S.C.):
Sec. 7402(b) 5
Sec. 7604(a) 5
36 Fed. Reg. 849 et seq. (1971) 10
United States Constitution:
Fourth Amendment 5
Fifth Amendment 1
Sixth Amendment 1

Rules of Internal Revenue Service and Secondary Sources:

ABA Code of Professional Responsibility, Ethical Consideration 4-4 27
(CCH, Internal Revenue Manual, Part IX—Intelligence, §9384.2) 22
1968 CCH Fed. Tax Rep. ¶6946 22

~~Cases:~~ Page

IRS News Release IR-949, Nov. 26, 1968; 1968 CCH. Stand. Fed. Tax Rep. ¶946 ..... 10, 22

McCormick, Evidence, 263 (1954) 12, 13

8 Wigmore, Evidence §2307 (McNaughton Rev. 1961) 8, 26

OPINION BELOW

The Opinion of the district court is reported at 352 F. Supp. 731 (E.D. Pa. 1972), and is printed as Appendix A to the Petition For Certiorari in this case. The Opinion of the court of appeals is reported at 500 F.2d 683 (3rd Cir. 1974), and is printed as Appendix B to the Petition For Certiorari.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 1974. The Petition For Certiorari was filed on July 26, 1974, and was granted on January 27, 1975. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent portion of the Fifth Amendment of the United States Constitution states:

> No person . . . shall be compelled in any criminal case to be a witness against himself. . .

The pertinent portion of the Sixth Amendment of the United States Constitution states:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence.

QUESTIONS PRESENTED

An accountant who handled bookkeeping for taxpayers made each year a written summary of taxpayers' checks and deposits. On or about August 5, 1971, the accountant gave taxpayers these summaries for the years 1969 and 1970. On August 17, 1971, taxpayers turned these same summaries over to their attorney, so that he could represent them in connection with a tax investigation by the Intelligence Division of the Internal Revenue Service. On December 1, 1971, a special agent of that Division served a summons on the attorney requiring him to produce these documents. The attorney refused on the ground that such a production would violate the Fifth Amendment rights of his clients. The taxpayers intervened in the enforcement proceeding and personally asserted their rights. Therefore, the questions presented are:

1. Does the Fifth Amendment protect a person from compelled production of self-incriminating documents which he holds in a personal capacity, consisting of summaries of his cancelled checks and deposit receipts compiled by his accountant?

2. If the answer to the above question is affirmative, is the Fifth Amendment right lost by the person's placing these documents in the custody of his counsel for use in representing the person in a criminal investigation?

STATEMENT OF THE CASE

In July, 1971, Alan Feldman, a special agent of the Intelligence Division of the Internal Revenue Service, contacted Morris and Sally Goldsmith ("the taxpayers"). He stated that he was a special agent investigating Mr. Goldsmith, and made an appointment with Mr. Goldsmith (30a-31a). At all times, up to and including the issuance of the summons on the taxpayers' attorney, the investigation of the taxpayers was conducted solely by the Intelligence Division of the Internal Revenue Service (24a, 34a).[1]

On August 3, 1971 the taxpayers retained Solomon Fisher to represent them (19a). Mr. Fisher is an attorney specializing in matters of income taxation (19a). Mr. Fisher thereafter informed Special Agent Feldman that he was representing the taxpayers and that the appointment of the taxpayers with Special Agent Feldman would not be kept (31a).

On or about August 4 or 5, 1971, taxpayer Morris Goldsmith informed his accountant, Harold Berson, that he desired to have records in the accountant's possession concerning himself and his wife examined by his attorney. The accountant thereupon delivered to the taxpayer "the balance of what we had" in the way of records concerning the taxpayers (51a, 53a-54a). On August 17, 1971, the taxpayers turned these records over to their attorney for his use in representing them, and the attorney retained the records in this capacity at all times thereafter (19a).

Special Agent Feldman first met with accountant Berson on October 22, 1971, and had no substantive discussion with the accountant prior to that time (31a-32a, 45a, 47a). On this occasion Special Agent Feldman served a summons on the accountant for documents concerning the taxpayer (26a, 47a, 71a-72a). The accountant explained that he had given what papers he had to the taxpayer at the taxpayer's request (45a, 51a-52a). The special agent asked the ac-

---

1. The function of the Intelligence Division is limited to enforcement of criminal statutes (see page 10, *infra*).

countant to request the papers from the taxpayers (52a). The accountant testified that "I contacted Mr. Goldsmith and told him that I would like to get the papers back, that I was requested by the Government to bring them to their offices" (52a). On the return date of the summons, the accountant appeared as directed by the summons, but the special agent was not there (27a, 53a). Later that day the accountant advised the special agent in a telephone conversation that he did not have the papers (53a).

On December 1, 1971, the special agent called the taxpayers' attorney. The special agent related that the attorney told him that "he was going to return the records to Mr. Goldsmith and, as far as he was concerned, I could contact Mr. Goldsmith" (29a). The special agent testified that this information caused him to issue and serve the summons on the taxpayers' attorney on the very day of the telephone conversation (4a-5a, 29a-30a). The attorney appeared as directed by the summons, with the records in his possession that might fit the description in the summons, but refused to permit inspection of these records (19a).

The summons served on the taxpayers' attorney is the subject of this proceeding. It directs the taxpayers' attorney to produce for examination "Analysis of Receipts and Disbursements" for each of the taxpayers for the years 1969 and 1970(4a).[2] The documents in question are simply listings of cancelled checks and deposits for 1969 and 1970, taken directly and entirely from the cancelled checks and deposit receipts of the taxpayers (50a, 61a). These notations were written by the accountant, but generally this kind of write-up is done by taxpayers (48a, 55a, 56a). The accountant testified that the listings represented a bookkeeping rather than accounting function, and that he did not consider them to be accountant's work papers (50a, 55a, 56a, 62a).

---

2. There is an additional category of documents identified in the summons, but the Government did not seek enforcement of the summons as to these documents (30a, 32a).

The accountant had performed the function of summarizing the taxpayers' cancelled checks and deposits for at least twenty-five years (50a, 54a). He regularly and consistently turned these summaries over to the taxpayers for their permanent possession after a period of not more than three or four years from the time of preparation (51a, 55a-56a, 57a, 61a, 65a, 66a, 68a). At the time the taxpayers requested records which were in the possession of the accountant, the summaries of cancelled checks and deposits for years prior to the last several years had already been given to the taxpayers (56a).

The accountant regarded the summaries of cancelled checks and deposits as belonging to the taxpayers, and the taxpayers shared this understanding (55a, 57a, 65a).

The government brought the present action under 26 U.S.C. §7402(b) and 7604(a) (1964) to enforce the summons served on the taxpayers' attorney (6a). The taxpayers intervened by order of the District Court, and asserted that compelled production of the records would violate their rights under the Fourth, Fifth and Sixth Amendments (15a-16a, 23a, 73a). The District Court held an evidentiary hearing, and concluded that the records were accountant's work papers, owned by the accountant, and that ownership by the accountant negated taxpayers' Fifth Amendment claim (Petition For Certiorari, A5-A7). The District Court ordered enforcement of the summons. The Court of Appeals, in an *en banc* opinion,[3] affirmed the District Court's Order, with one judge dissenting on the Fifth Amendment issue (Petition For Certiorari, A8-A44).

---

3. One Judge (Judge Adams) did not participate in the decision.

SUMMARY OF ARGUMENT

The present case involves a summons served on an attorney pursuant to an investigation of his clients by the Intelligence Division of the Internal Revenue Service. The Intelligence Division's function is limited by regulation to criminal matters. The summons sought summaries prepared by taxpayers' accountant of the cancelled checks and deposit receipts of the taxpayers for the years 1969 and 1970. The accountant had prepared such summaries for each year over a twenty-five year period, and regularly gave the summaries to taxpayers after keeping them for several years.

Approximately two weeks after receiving the summaries for 1969 and 1970, taxpayers delivered these summaries, as well as other records, to their attorney, for his use in representing them in the criminal investigation. The summons on the attorney was served several months later, immediately after the attorney informed the special agent that he was about to return the records to his clients.

There are two legal questions. Would the taxpayers have been protected from compulsory production of the summaries if they had retained the summaries themselves and, if so, did they lose this protection by delivering the summaries to their attorney.

The privilege against self-incrimination protects an individual from being compelled to produce private papers which may incriminate him. *Boyd v. United States*, 116 U.S. 616 (1886). The privilege may be asserted by one who has possession of incriminating papers "in a personal capacity". *United States v. White*, 322 U.S. 694 (1944); *United States v. Cohen*, 388 F.2d 464 (9th Cir. 1967). Ownership is not a condition for Fifth Amendment protection. *Couch v. United States*, 409 U.S. 322, (1973).

Taxpayers' possession of the summaries (prior to turning them over to their attorney) was in a personal capacity. The summaries concerned the taxpayers own

financial affairs, which they conducted as individuals, and the summaries were held personally, rather than as a representative or agent. Thus, taxpayers could not have been compelled to produce these summaries as long as the summaries remained in their actual possession. *United States v. Kasmir*, 499 F.2d 444, 450-452 (5th Cir. 1974), *cert. granted*, 43 U.S.L.W. 3412 (U.S. Jan. 27, 1975) (No. 74-611) (Petition For Certiorari at 11A-13A); *United States v. Cohen*, 388 F.2d 464 (9th Cir. 1967). Moreover, to the extent it may be relevant, taxpayers' possession of the summaries was also "rightful", as it accorded with the possession of this kind of record over twenty-five years, and, at the very least, was fully agreed to by the accountant. See *United States v. Kasmir, supra; United States v. Cohen, supra* at 469-470.

The taxpayers did not lose their Fifth Amendment privilege by delivering the summaries to their attorney for his use in representing them in the Intelligence Division's investigation. Taxpayers had the right to be represented by retained counsel in the investigation. *Escobedo v. Illinois*, 378 U.S. 478 (1964); and see *Maness v. Myers*, 43 U.S.L.W. 4143, 4150 (U.S. Jan. 15, 1975) (concurring opinion of Mr. Justice Stewart). This right is publicly recognized by the Internal Revenue Service, and the Service by its rules requires all special agents to inform taxpayers under investigation of their right to counsel. The Fifth Amendment privilege cannot be unwittingly forfeited by the exercise of the right to counsel, which is the very means by which the Fifth Amendment is implemented. *Maness v. Myers, supra* at 4149. Nor can the exercise of the right to retained counsel be penalized by imposing forfeiture of the Fifth Amendment privilege on it. *Gardner v. Broderick*, 392 U.S. 273 (1968); *Uniform Sanitation Men Association v. Commissioner of Sanitation*, 392 U.S. 280 (1968); *Spevack v. Klein*, 383 U.S. 511 (1967).

The delivery of the summaries by the taxpayers to their attorney does not adversely affect their Fifth Amendment privilege for the additional reason that it did not deprive them of the requisite possession to assert the privilege. The attorney stood in the shoes of the taxpayers in representing them in the Intelligence Division investigation, and the taxpayers had a justifiable expectation that the information in the summaries would be treated confidentially by their attorney. *United States v. Kasmir, supra; United States v. Judson*, 322 F.2d 460, 467 (9th Cir. 1963); 8 Wigmore, *Evidence* §2307 (McNaughton Rev. 1961); and see *Couch v. United States, supra* at 350. Thus, the attorney's holding the summaries for the taxpayers constituted constructive possession by the taxpayers for purposes of the privilege against self-incrimination.

ARGUMENT

A. The Taxpayers Could Not Have Been Compelled to Produce the Records Identified in the IRS Summons Had They Retained Possession of Those Records.

1. TAXPAYERS HELD THE RECORDS IN QUESTION, CONCERNING THEIR PERSONAL FINANCIAL AFFAIRS, IN A PERSONAL CAPACITY BEFORE DELIVERING THEM TO THEIR ATTORNEY FOR THE PURPOSE OF OBTAINING LEGAL ADVICE.

The records identified by the Intelligence Division of the Internal Revenue Service in the summons served on attorney Fisher concern solely the personal financial affairs of taxpayers. They consist of listings of checks and deposit receipts of the taxpayers for the years 1969 and 1970. Such summaries are generally prepared by taxpayers themselves rather than by accountants. In the twenty-five years during which accountant Berson performed this bookkeeping for the taxpayers, he regularly gave these summaries to the taxpayers within three or four years of the time they were prepared. Both the accountant and the taxpayers regarded the summaries as belonging to the taxpayers (see pages 4-5, *supra*).

In the beginning of August, 1971, the taxpayers requested financial records in their accountant's possession, which included the summaries for 1969 and 1970. The accountant willingly gave these summaries to the taxpayers, as he had willingly given them the summaries for the previous years. Thus, possession by the taxpayers was in a personal capacity and, to the extent it is relevant, their possession was "rightful".

Taxpayer Morris Goldsmith's request for the records concerning himself and his wife which their accountant had not yet given to them was a predictable and appropriate response to the knowledge that he was the subject of a criminal investigation by the Internal Revenue Service. So, too, was his retention of counsel. A special agent is required

by Internal Revenue Service rules to advise a taxpayer at their initial meeting that the taxpayer has the right to seek the assistance of an attorney. IRS News Release IR-949, Nov. 26, 1968; 1968 CCH Stand. Fed. Tax Rep. ¶946. Approximately two weeks after these additional records were delivered to the taxpayers, they turned the records over to their attorney for the purpose of obtaining legal advice.

The present case involves an investigation of alleged or suspected criminal violations. The investigation was at all times conducted solely by the Intelligence Division of the Internal Revenue Service (24a, 32a-34a). The Court has recognized that the functions of the various divisions of the Internal Revenue Service are governed by regulations issued by the Secretary of the Treasury. See *Donaldson v. United States*, 400 U.S. at 517, 534 (1971). The regulations effective at the time that the summons was issued in this case limited the responsibility and function of the Intelligence Division to criminal matters.[4] The Internal Revenue Service is bound by these regulations, and indeed has not disputed their accuracy. See *United States v. Nixon*, 418

4. The regulations define the function of the Intelligence Division as follows:

> The Intelligence Division enforces the criminal statutes applicable to income, estate, gift, employment, and excise tax laws (except those relating to alcohol, tobacco, narcotics and certain firearms), by developing information concerning alleged criminal violations thereof, evaluating allegations and indications of such violations to determine investigations to be undertaken, investigating suspected criminal violations of such laws, recommending prosecution when warranted, and measuring effectiveness of the investigation and prosecution processes. The Division assists other Intelligence offices in special inquiries, drives and compliance programs and in the normal enforcement programs, including those combating organized wagering, racketeering and other illegal activity, by providing investigative resources upon regional or National Office request. It also assists U.S. attorneys and Regional Counsel in the processing of Intelligence cases, including the preparation for and trial of cases. [36 Fed. Reg. 849 et seq. (1971)].

U.S. 683 (1974); *United States v. Heffner*, 420 F.2d 809 (4th Cir. 1969) and *United States v. Leahey*, 434 F.2d 7 (1st Cir. 1970).

The accountant gave the records sought in this case to the taxpayers seven weeks before the special agent served a summons on the accountant, and almost four months before issuance and service of the summons which is the subject of this case (see pages 3-4, *supra*). The courts have stated that the rights of the taxpayers in an enforcement case become fixed when the summons is served. *Couch v. United States*, 409 U.S. 322, 329, n.9 (1973); *United States v. Kasmir*, 499 F.2d 444, 450-451 (5th Cir. 1974), *cert. granted*, 43 U.S.L.W. 3412 (U.S. Jan. 27, 1975) (No. 74-611), Petition For Certiorari at 12A-13A; *United States v. Zakutansky*, 410 F.2d 68, 72 (7th Cir. 1968), *cert. denied*, 393 U.S. 1021. Thus, at the relevant time in this case, taxpayers' attorney was in possession of the records for the purpose of giving legal advice, the records having been delivered to him by taxpayers following actual possession by them in a personal capacity for approximately two weeks.

2. *A Private Citizen Who Holds Incriminating Records Concerning His Personal Financial Affairs Cannot Be Compelled to Produce Those Records.*

Governmental compulsion against a citizen to produce private papers which may incriminate him is a violation of fundamental constitutional rights. In *Boyd v. United States*, 116 U.S. 616 (1886), the Court held that compelled production of an invoice in a forfeiture proceeding violated the Fourth and Fifth Amendment rights of the owner and possessor of the document. In *Boyd*, this Court recalled the deep historic roots of the right of private citizens not to disclose private papers to government agents. In discussing Lord Camden's Opinion in *Entick v. Carrington*, 19 Howell, St. Tr., 1029, the Court stated (116 U.S. at 630):

> The principles laid down in [*Entick*] affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case

then before the court, with its adventitious circumstances; they apply to all invasions, on the part of the Government and its employees, of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where the right has never been forfeited by his conviction of some public offense; it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other.

The holding of *Boyd* that compulsory production of the invoice would violate petitioner's Fifth Amendment rights has never been questioned by the Court, and its continued vitality has been acknowledged on numerous occasions. See, *e.g.*, *Bellis v. United States*, 417 U.S. 85, 87-88 (1974); *United States v. Calandra*, 414 U.S. 338, 346 (1974); *United States v. Dionsio*, 410 U.S. 1, 11 (1973); *Schmerber v. California*, 384 U.S. 757, 763-64 (1966). Justice Brandeis characterized *Boyd* as "a case that will be remembered as long as civil liberty lives in the United States." *Olmstead v. United States*, 227 U.S. 438, 474 (1928) (dissenting opinion).

Thus, historically, the right of an individual not to be a witness against himself has included the right not to produce incriminatory papers. As stated by McCormick:

> The privilege, as it emerged in England and as it was expressed in our constitutions was against being compelled to "be a witness" or "to give evidence" against oneself. Compulsion to be a witness or to give evidence was compulsion to do those things which a witness would, by traditional judicial process be required to do. These were only (1) to give oral testimony as evidence of facts stated, and (2) to produce, in court, under judicial order, documents and other objects. (Footnotes omitted) [McCormick, *Evidence*, 263-264 (1954)]

Two basic considerations compel the conclusion that private papers are within the Fifth Amendment's protection. The first is the "testimonial" or "communicative" nature of the documents themselves: they have precisely the same character as the testimony that would be compelled if the citizen were required by compulsory process to take the stand. Thus, in *United States v. Dionsio*, 410 U.S. 1 (1973), this Court distinguished for Fifth Amendment purposes between the physical characteristics of a defendant and a defendant's private books and records in the following manner:

> But *Boyd* dealt with the compulsory production of private books and records, *testimonial sources*, a circumstance in which the "Fourth and Fifth Amendments run almost into each other". (Emphasis added) (410 U.S. at 7, n. 6).

And in *Warden v. Hayden*, 387 U.S. 297 (1967), the Court stated:

> The items of clothing involved in this case are not "testimonial" or "communicative" in nature, and their introduction therefore did not compel respondent to become a witness against himself in violation of the Fifth Amendment. (307 U.S. at 302-303).

The other basis for Fifth Amendment protection is the testimonial communication inherent in the very act of producing documents. To produce them in response to the demand is to identify and authenticate them. Thus, in *Schmerber v. California*, 384 U.S. 757, 763-764 (1966), the Court stated:

> It is clear that the protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers.

See also, *Bellis v. United States*, 417 U.S. 85, 88 (1974); *Couch v. United States*, 409 U.S. 322, 327 (1973); *Gilbert v. California*, 388 U.S. 263, 266-267 (1967); *Curcio v. United States*, 354 U.S. 118, 125 (1957); and 8 Wigmore, *Evidence* §2264, at 379-380 (McNaughton Rev. 1961).

The fact that a third party may be able to identify or authenticate the documents at a subsequent legal proceeding does not render the identification and authentication of the party who is required to produce the documents any less self-incriminating. The Fifth Amendment protects against self-incriminating communication, and is not limited to communications at the time of a criminal proceeding. The scope of the privilege is summarized in *Maness v. Meyers*, 43 U.S.L.W. 4143, 4147 (U.S. Jan. 15, 1975):

> This Court has always broadly construed its [Fifth Amendment's] protections to assure that an individual is not compelled to produce evidence which later may be used against him as an accused in a criminal action. *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892); *Arndstein v. McCarthy*, 254 U.S. 71, 72-73 (1920). The protection does not merely encompass evidence which may lead to criminal conviction, but includes information which would furnish a link in the chain of evidence that could lead to prosecution, as well as evidence which an individual reasonably believes could be used against him in a criminal prosecution. *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

The holding in *Maness v. Meyers* is also instructive:

> We conclude that an advocate is not subject to the penalty of contempt for advising his client, in good faith, to assert the Fifth Amendment privilege against self-incrimination *in any proceeding embracing the power to compel testimony*. (Emphasis added) (41 U.S. L.W. at 4149).

Even if it be assumed that taxpayers did not "own" the listings prepared by the accountant from taxpayers' records and delivered to taxpayers at their request, there is no question that taxpayers possessed the documents in a personal capacity. This Court has explicitly rejected earlier precedents conditioning constitutional rights on property concepts. *Katz v. United States*, 389 U.S. 347, 352-353 (1967); *Warden v. Hayden*, 387 U.S. 294, 304-306 (1967); *Silverman v. United States*, 365 U.S. 505, 511 (1961); *Jones v. United States*, 362 U.S. 257, 266-267 (1960).

In *Couch v. United States*, 409 U.S. 322 (1973), the Court pointed out that possession of documents, not ownership, bears the most significant relationship to the Fifth Amendment's prohibition against extortion of information from the accused. Although *Couch* involved a taxpayer who had neither actual nor constructive possession of the records sought, the Court referred to the case of possession without ownership, emphasizing the final clause from its earlier statement in *United States v. White*, 322 U.S. 694, 699 (1944):

> The papers and effects which the privilege protects must be the private property of the person claiming the privilege, or *at least in his possession in a purely personal capacity*. (Emphasis in original) (409 U.S. at 330, n.10).

The statement from *United States v. White*, cited in *Couch*, reflects holdings of the Court that documents of corporations, labor unions, partnerships, and other state created or collective entities are not immune from production when held by an individual (*e.g.*, a corporate officer) in his *representative* capacity. See *Bellis v. United States*, 417 U.S. 85 (1974); *United States v. White, supra*; *Wilson v. United States*, 221 U.S. 361 (1911). Indisputably,

the records here in question were held by taxpayers in a personal capacity before they delivered them to their attorney.

Of the many Internal Revenue Service summons cases that have been decided by the lower courts, this Court singled out *United States v. Cohen*, 388 F.2d 464 (9th Cir. 1967), for approval in its opinion in *Couch v. United States*, *supra*. In *Cohen*, the Ninth Circuit upheld the taxpayer's assertion of Fifth Amendment privilege not to produce work papers prepared by his accountant on the basis of information supplied by the taxpayer. The Ninth Circuit expressly rejected the government's contention that the taxpayer's ownership of the documents was a condition of Fifth Amendment protection.

> As the government recognizes, the rule it suggests would make ownership of subpoenaed documents virtually essential to a claim of privilege, for ordinarily only the owner will be able to assert a right to possession superior to all others. But it is possession of papers sought by the government, not ownership, which sets the stage for exercise of the governmental compulsion which it is the purpose of the privilege to prohibit. The "cruel trilemma" of perjury, contempt, or self-incrimination, of which the Court spoke in Murphy v. Waterfront Comm'n, faces the individual whenever the government seeks to compel him to produce papers in his possession, for he must then either falsify, accept punishment for contempt, or yield. Lack of title does not free him from this choice. Possession of potentially incriminating documents is thus the necessary and sufficient condition of the privilege, for the compelled production, identification, and authentication of incriminating materials by the possessor will incriminate him, whether or not the documents are his. (Footnotes omitted) (388 F.2d at 468).

In *Couch*, the Court noted that conditioning Fifth Amendment rights on ownership placed "unnecessary emphasis on the form of communication to an accountant and the accountant's own working methods, while diverting the inquiry from the basic purposes of the Fifth Amendment's protections" (409 U.S. at 331). The present case confirms this observation. The records sought are simply listings of checks and deposits, which most taxpayers do for themselves (see page 4, *supra*). If taxpayers had performed this function themselves, or if they had had an employee do it, or even if an accountant had done it at the taxpayers' home or business, there would be no dispute about ownership. It is difficult to conceive of a Fifth Amendment policy which is served by permitting a different result simply because the accountant performed this service at his own office and kept the records there for a limited time before delivering them to the possession of his principal.

3. *Had Taxpayers Not Delivered the Summaries to Their Attorney, They Could Not Have Been Compelled to Produce Them Without Violation of Their Fifth Amendment Privilege.*

The summaries in question were in taxpayers' possession in a personal capacity; they were given to the taxpayers willingly by their accountant, who considered the summaries to be theirs and who regularly over twenty-five years had given the summaries to taxpayers; and they concerned taxpayers private financial affairs. Had the taxpayers continued to hold these documents themselves, or if the summons had been served on taxpayers before the summaries were delivered to their attorney, the taxpayers could have claimed the Fifth Amendment privilege.

The records sought in this case reflect directly and solely the financial transactions of taxpayers, each of whom conducted a business as a sole proprietor (67a, 69a). There can be no question that the records sought constitute the kind of papers for which private citizens can assert Fifth Amendment protection. In *Bellis v. United States*, 417 U.S. 85, 87-88 (1974), the Court stated:

> The privilege applies to the business records of the sole proprietor or sole practitioner as well as to per-

sonal documents containing more intimate information about the individual's private life. *Boyd v. United States, supra, Couch v. United States*, 409 U.S. 322 (1973); *Hill v. Philpott*, 445 F.2d 144 (CA7), cert. denied, 404 U.S. 991 (1971); *Stuart v. United States*, 416 F.2d 459, 462 (CA5 1969).

The fact that taxpayers' hand did not transcribe the items subpoenaed certainly does not impair their claim of Fifth Amendment protection. "Where one's private documents would tend to incriminate him, the privilege exists although they were actually written by another person." *Wilson v. United States*, 221 U.S. 361, 378. Significantly, the document sought in *Boyd* was also a business record (an invoice) which had been prepared by a third party. *Boyd v. United States*, 116 U.S. at 619.

At no point has the government contended that the records sought are required business records within the doctrine of *Shapiro v. United States*, 335 U.S. 1 (1948). Even if it were not now precluded from doing so on appeal [see *Spevack v. Klein*, 385 U.S. 511, 517-519 (1967)], it is plain that the records here at issue are in no sense "public" documents. See *Marchetti v. United States*, 390 U.S. 39, 55-57 (1968); *Grosso v. United States*, 309 U.S. 62, 68 (1968); *Haynes v. United States*, 390 U.S. 85, 98-99 (1968); *Leary v. United States*, 395 U.S. 6, 12-13 (1969); *Hill v. Philpott*, 445 F.2d 144, 146, n.2 (7th Cir. 1971).

The majority opinion of the Court of Appeals in this case did not decide whether the taxpayers could have asserted Fifth Amendment rights if they had not delivered the summaries to their attorney and the summons had been served on them. Instead, that Court pointed to the two weeks during which the taxpayers had actual possession of the summaries, and termed this possession "fleeting" and "transitory" and therefore insufficient to confer the degree of privacy which that Court felt was required to support a claim of Fifth Amendment privilege. *United States v. Fisher*, 500 F.2d 683, 690-692 (3d Cir. 1974), *cert. granted*, 43 U.S.L.W. 3412 (U.S. Jan. 27, 1975) (No. 74-18), Petition For Certiorari at A20-A24.[5]

The Court of Appeals emphasized privacy to the exclusion of the other values which are more basic to the Fifth Amendment. See *Tehan v. Scott*, 382 U.S. 406, 415-416 (1966); *United States v. Cohen, supra* at 471. Nonetheless, to the extent privacy is a concern of the Fifth Amendment, that value would be undermined by excluding personal financial records from the area of Fifth Amendment protection simply because they were prepared by an agent and held temporarily by him. "Financial transactions can reveal much about a person's activities, associations and beliefs." *California Bankers Association v. Shultz*, 416 U.S. 21 78-79 (1974) (concurring opinion of Mr. Justice Powell). The Ninth Circuit in *United States v. Cohen* recognized that the private nature of personal financial records is not altered by the fact that they are prepared by an accountant. That Court reasoned (388 F.2d at 471-472):

> Though prepared by Berke [the accountant] for use by him in the performance of his work, the work papers were scarcely public documents. They embody countless items of information relating to Cohen's purely personal affairs, including itemizations and summaries of data prepared directly from Cohen's bank statements, cancelled checks, and similar records. They were plainly intended for no eyes but those Cohen might designate. To pretend that such papers did not in substance reflect matter personal and private to Cohen, and to treat such papers as a

5. The Court of Appeals' holding is in direct conflict with the holding of the Court of Appeals for the Fifth Circuit in *United States v. Kasmir, supra*. In *Kasmir*, where the possession by the taxpayer was only momentary, the Fifth Circuit held that the taxpayer "was in the position to assert his Fifth Amendment privilege, if the summons had then been served", and that his rights were not diminished by his delivering the records to his attorney (499 F.2d at 451-455).

source of information "independent" of Cohen, would be to condone the very "shifts and subterfuges" which the government calls upon us to condemn.

Some Internal Revenue Service summons cases have applied the criteria of "rightful" possession to the assertion of Fifth Amendment rights. See *United States v. Zakutansky*, 401 F.2d 68 (7th Cir. 1968), *cert. denied*, 393 U.S. 1021; *United States v. Foster, Lewis, Langley & Onion*, 65-1 U.S. Tax Cases ¶9418 (W.D. Tex. 1964); *Application of House*, 144 F.Supp. 95 (N.D. Cal. S.D. 1956); *Contra, Cohen v. United States*, 388 F.2d at 469-470; *In re Grant*, 198 F.708, 709 (S.D.N.Y. 1912), *aff'd* 227 U.S. 74 (1913) (L. Hand, J.). Under this criteria, a person holding papers as an agent of another [see *United States v. Egenberg*, 443 F.2d 512 (3d Cir. 1971)], or by theft, or whose possession constitutes an unlawful conversion [see *Deck v. United States*, 339 F.2d 739 (D.C. Cir. 1964)] cannot assert Fifth Amendment protection from compelled production of those papers.[6]

Even assuming that "rightful" possession is a valid condition of Fifth Amendment rights, it cannot be said in the present case that taxpayers' possession was wrongful. Taxpayers had regularly received these summaries for their indefinite possession over their twenty-five year relationship with their accountant, and both the accountant and

6. Application of a requirement of "rightful" possession to an individual being investigated, as in this case, solely for suspected criminal violations, when the records are sought as part of that investigation, appears inconsistent with the history as well as the values of the Fifth Amendment privilege (see pages 12-14, *supra*). Certainly personal records could not be compelled from the individual as part of pre-trial discovery in a criminal case, even if the records were not in his "rightful" possession. The Fifth Amendment is not limited to formal criminal proceedings (see pages 14-15, *supra*), and even certain limitations which have been placed on the Fifth Amendment privilege (having no bearing on the present case) have not applied to criminal investigations. See *California v. Byers*, 402 U.S. 424 (1971); *Marchetti v. United States, supra; Grosso v. United States, supra; Haynes v. United States, supra; Leary v. United States, supra*.

taxpayers regarded the summaries as belonging to the taxpayers. Possession of summaries by taxpayers was the norm, and at the very least it was fully agreed to by the accountant. The accountant's inquiring of the taxpayers whether they could return the summaries, solely as an accommodation to the special agent, cannot be said to render taxpayers' possession unlawful.

Cohen v. United States, supra, although rejecting "rightful" possession as a condition of Fifth Amendment rights, assumed such a requirement *arguendo* and ruled that it was satisfied on facts very similar to those in the present case:

> In any event, Cohen's [taxpayer's] possession cannot fairly be characterized as wrongful. Berke [the accountant] testified without contradiction that he considered all papers relating to his client's affairs to be theirs to command, and that it had been his invariable practice to deliver such papers to the client whenever requested. When Beason [special agent] asked Berke to request the return of the papers, Berke simply reported the fact to Cohen, saying "Mr. Beason has asked me to ask you to return the files that you took from our office". This would appear to have been no more than a transmittal by Berke to Cohen of Beason's request; at least it was scarcely a clear demand by Berke that Cohen submit to Berke's superior right. (Footnote omitted) (388 F.2d at 470).

Accord, *United States v. Foster, Lewis, Langley & Onion*, U.S. Tax Cases, 65-1, ¶9418 (W.D. Tex. 1964), *Application of House*, 144 F.Supp. 95 (N.D. Cal. S.D. 1956).

The Internal Revenue Service, by its own regulations and by its conduct in this case, appears to acknowledge that the taxpayers could not have been compelled to produce the records which it seeks. The Internal Revenue Service requires all special agents to give the following statement at the outset of their first meeting with the taxpayer:

> In connection with my investigation of your tax liability (or other matter) I would like to ask you some questions. However, first I advise you that under the Fifth Amendment to the Constitution of the United States I cannot compel you to answer any questions *or to submit any information if such answers or information might tend to incriminate you in any way*. I also advise you that anything which you say and any documents which you submit may be used against you in any criminal proceeding which may be undertaken.
>
> I advise you further that you may, if you wish, seek the assistance of an attorney before responding. (Emphasis added) (CCH, Internal Revenue Manual, Part IX — Intelligence, §9384.2).

This position and policy statement is also contained in an official news release of IRS. IRS News Release, IR-949, Nov. 26, 1968; 1968 CCH Fed. Tax Rep. ¶6946. Fairness and due process in law enforcement require that the government be bound by its public statements of position and policy. *United States v. Nixon*, 418 U.S. 683, 694-696 (1974); *Service v. Dulles*, 354 U.S. 363 (1959); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954); *United States v. Leahey*, 434 F.2d 7 (1st Cir. 1970); *United States v. Heffner*, 420 F.2d 809 (4th Cir. 1969). Moreover, Special Agent Feldman's haste to serve the summons when he learned that the attorney was about to return the records to the taxpayers (see page 4, *supra*) demonstrates the recognition of the Internal Revenue Service that it could not constitutionally compel taxpayers to produce the records.

The uncontradicted evidence shows that taxpayers had possession of the records in a personal capacity and, to the extent it is relevant, that their possession was "rightful". Thus, if taxpayers had continued in possession of the records, they could have successfully asserted Fifth Amendment protection from compelled production of those records.

B. The Taxpayers Did Not Forfeit Their Fifth Amendment Rights by Turning Over the Summaries to Their Attorney to Obtain Legal Advice in Connection with the Criminal Investigation Being Made of Them.

1. *Taxpayers Exercising Their Right to Retain Counsel in a Criminal Investigation Cannot Thereby Be Deprived of Their Fifth Amendment Privilege.*

Taxpayer Morris Goldsmith was under investigation for suspected violation of criminal laws. As the subject of a criminal investigation, called upon to give evidence, he had the right under the Fifth and Sixth Amendment to employ an attorney to represent him and give him legal advice. See *Escobedo v. Illinois*, 378 U.S. 478 (1964).[7] Moreover, the Internal Revenue Service, by its publicly stated rules, recognizes this right, and its publicly stated position and policy is binding on it (see pages 21-22, *supra*).

The taxpayers' turning over financial records to their attorney, in connection with the investigation of them by the Intelligence Division, is a natural and predictable incident of the attorney-client relationship. Thus, the difference between possession of the records by taxpayers and possession by their attorney, on which the lower court and the government place great reliance, is the direct result of the taxpayers exercise of their right to counsel. If taxpayers lost

---

7. Petitioners do not understand *Kirby v. Illinois*, 406 U.S. 682 (1972), to hold otherwise. In *Kirby* the Court emphasized that the right against self-incrimination was "in no way implicated" (406 U.S. at 687). Moreover, *Kirby* involved right to *appointed* counsel, which is by no means co-extensive with the right to retained counsel. A "due process right to retained counsel in civil proceedings" has been recognized by two members of the Court. *Maness v. Myers*, 43 U.S.L.W. 4143, 4150 (U.S. Jan. 15, 1975) (concurring opinion of Mr. Justice Stewart). This recognition indicates the larger scope of the right to retained counsel, which must at the very least apply to the subject of a criminal investigation who is asked to provide information to the government authority investigating him.

their Fifth Amendment rights because they delivered records in their actual possession to their attorney, then this forfeiture would be a penalty for the exercise of their right to counsel. Such a penalty on the exercise of a constitutional right is impermissible. *Spevack v. Klein*, 385 U.S. 511 (1967); *Uniform Sanitation Men Association v. Commissioner of Sanitation*, 392 U.S. 280 (1968); *Gardner v. Broderick*, 392 U.S. 273 (1968). The Court has struck down a number of far less serious burdens on the exercise of constitutional rights. See *Miami-Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Talley v. California*, 362 U.S. 60 (1960); *Speiser v. Randall*, 357 U.S. 513 (1958); and *Murdock v. Pennsylvania*, 319 U.S. 103 (1943).

The playing off of the right to counsel against the Fifth Amendment privilege is particularly indefensible in view of the complementary and close relation between these rights. In *Maness v. Meyers*, *supra*, the Court observed that the advice of an attorney is the means by which the Fifth Amendment privilege is implemented, and that

> A layman may not be aware of the precise scope, the nuances, and boundaries of his Fifth Amendment privilege. It is not a self-executing mechanism; it can be affirmatively waived, or lost by not asserting it in a timely fashion. (43 U.S.L.W. at 4149).

See also *Miranda v. Arizona*, 384 U.S. 436, 469 (1966). Thus, any penalty or burden on the right to counsel in a criminal investigation also contravenes the privilege itself.

An individual may not be put to a "Hobson's choice" between forfeiting his privilege against self-incrimination or his right to counsel. See *Gardner v. Broderick*, *supra* at 277. Even less can he be held to *unwittingly* forfeit the privilege simply by exercising his right to counsel, particularly where the investigating agency recognizes and reminds the individual of his right to counsel, and would benefit from the forfeiture.

The record in this case demonstrates that the Internal Revenue Service intentionally sought to use taxpayers' consultation with counsel as a means of depriving taxpayers of their Fifth Amendment privilege. The summons was issued and served on the attorney later on the same day that he advised the special agent that he was about to return the records to the taxpayers. The special agent testified it was this statement by the attorney that caused him to immediately issue and serve the summons (29a-30a). The special agent was apparently aware of the statement in the Intelligence section of the Internal Revenue Manual that taxpayers cannot be compelled to submit information which might tend to incriminate them (see pages 21-22, *supra*), and therefore acted to prevent the attorney from returning the records to his clients. Constitutional rights cannot be denied on the basis of such gamesmanship.

2. *TAXPAYERS HAD CONSTRUCTIVE POSSESSION OF RECORDS IN THE CUSTODY OF THEIR ATTORNEY WHICH THEY DELIVERED TO HIM TO OBTAIN LEGAL ADVICE IN CONNECTION WITH A CRIMINAL INVESTIGATION BEING MADE OF THEM.*

The delivery of the summaries by the taxpayers to their attorney does not adversly affect their Fifth Amendment privilege for the additional reason that it did not deprive them of the requisite possession to assert the privilege. This Court recognized in *Couch v. United States*, *supra*, that constructive possession of documents can enable an individual to successfully assert Fifth Amendment protection from compelled disclosure. 409 U.S. at 333. The Court further indicated that justifiable expectation of privacy by the person asserting the privilege was an important consideration in determining whether there was constructive possession by him.

The summaries in question were turned over by taxpayers to their attorney for the attorney's use in representing and furnishing legal advice to them. At the time the

taxpayers were under investigation by the Intelligence Division for suspected violation of criminal laws (see page 3, *supra*).

If the principle of constructive possession has any meaning whatsoever, it necessarily must apply to an attorney representing a client who is under criminal investigation. This point was asserted by the Ninth Circuit in *United States v. Judson*, 322 F.2d 460, 467 (9th Cir. 1963):

> The government states that the evil which the Fifth Amendment sought to prevent is not present when the prosecution seeks evidence of A's guilt from B. But this argument ignores the realities of the relationship existing where B is A's attorney. An attorney is his client's advocate. His function is to raise all the just and meritorious defenses his client has. No other "third party", nor "agent", nor "representative" stands in such a unique relationship between the accused and the judicial process as does his attorney. He is the only person besides the client himself who is permitted to prepare and conduct the defense of a matter under investigation. The attorney and his client are so identical with respect to the function of the evidence and to the proceedings which call for its production that any distinction is mere sophistry.

Accord, *United States v. Kasmir*, *supra* at 452; *Colton v. United States*, 306 F.2d 633, 639 (2nd Cir. 1962), *cert. denied*, 371 U.S. 951 (1963); and see *Brody v. United States*, 243 F.2d 378, 387 (1st Cir. 1957), *cert. denied*, 354 U.S. 923; 8 Wigmore, *Evidence* §2307 (McNaughton Rev. 1961); *Couch v. United States*, *supra* at 350 (dissenting opinion of Mr. Justice Marshall).[8] It is significant that this Court

8. The Government relies on *United States v. White*, 487 F.2d 1335 (5th Cir. 1973), *cert. denied*, 43 U.S.L.W. 3212 (U.S. Oct. 15, 1974); *Bouscher v. United States*, 316 U.S. 451 (8th Cir. 1963); *In Re Fahey*, 300 F.2d 383 (6th Cir. 1961). However, in none of these cases did the taxpayer have possession of the records at any time.

in *Couch* referred to *United States v. Judson*, *supra*, as a case "where possession and ownership conjoined" (409 U.S. at 330), although actual possession in that case as in this rested with the attorney and not the taxpayer.

There can be no question that an individual who gives documents to an attorney representing him in a criminal matter has a justifiable expectation that the documents will be held in confidence. The attorney's obligation not to disclose information of a confidential nature to third parties is a tenet of legal ethics. *ABA Code of Professional Responsibility, Ethical Consideration* 4-4, states in part:

> The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge.

Attorney Fisher stood in the shoes of his clients in representing them in the investigation by the Intelligence Division, and he was bound by the attorney-client relationship not to disclose to third parties the summaries given to him by the taxpayers. Attorney Fisher received the summaries directly from his clients. For purposes of the Fifth Amendment privilege, the taxpayers had constructive possession of the summaries when their attorney was served with the summons to produce them.

CONCLUSION

For the reasons stated, the judgment of the Court of Appeals should be reversed, and the case remanded to the Court of Appeals for the purpose of directing the District Court to deny the Petition To Enforce Internal Revenue Summons.

Respectfully submitted,

RICHARD L. BAZELON
SOLOMON FISHER

2600 The Fidelity Building
Philadelphia, Penna. 19109

Supreme Court, U. S.
FILED
JUN 16 1975
MICHAEL RODAK, JR., CLERK

Nos. 74-611 and 74-18

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

C. D. KASMIR AND JERRY A. CANDY

SOLOMON FISHER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FIFTH AND THIRD CIRCUITS

BRIEF FOR THE PETITIONERS IN NO. 74-611 AND FOR THE RESPONDENTS IN NO. 74-18

ROBERT H. BORK,
Solicitor General,
SCOTT P. CRAMPTON,
Assistant Attorney General,
LAWRENCE G. WALLACE,
Deputy Solicitor General,
STUART A. SMITH,
Assistant to the Solicitor General,
ROBERT E. LINDSAY,
GARY R. ALLEN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Constitutional and statutory provisions involved	3
Statement	4
Summary of argument	13
Argument:	
I. The client's privilege against self-incrimination is not a bar to required production of his accountant's workpapers which have been placed in the client's possession and then turned over by the client to his attorney	18
A. The privilege against self-incrimination does not apply to possessory interests in documents which are not held in a purely personal capacity	18
B. The client's privilege against self-incrimination does not extend to accountant's workpapers which are placed in the custody of the taxpayer-client	23
C. The privilege against self-incrimination does not arise as a result of the taxpayer's transfer of the accountant's workpapers to his attorney	35

578-371—75——1

Argument—Continued Page
II. Even if the client's privilege against self-incrimination were available as a bar to production of his accountant's work-papers, the claimant's attorney could not invoke the privilege on behalf of the client 39
Conclusion 42

CITATIONS

Cases:

Application of House, 144 F. Supp. 95 41
Bellis v. *United States*, 417 U.S. 85 ..... 14, 20, 21, 22, 23, 26, 30, 33
Bouschor v. *United States*, 316 F.2d 451 ..... 37, 41
Boyd v. *United States*, 116 U.S. 616 ..... 20, 21
California Bankers Assn. v. *Shult* O, 416 7.S. 21 ..... 21, 31
Colton v. *United States*, 306 F.2d 633, certiorari denied, 371 U.S. 951 41
Couch v. *United States*, 409 U.S. 322 ..... 9, 13, 20–21, 24, 25, 26, 30, 31–32, 35, 37, 40
Deck v. *United States*, 339 F.2d 739 28
Donaldson v. *United States*, 400 U.S. 517 ..... 21, 24, 31
Fahey, In re, 300 F.2d 383 41
Grand Jury Appearance of Alvin S. Michaelson, Esq., In re, C.A. 9, No. 74-3409, decided January 22, 1975, certiorari denied, No. 74-1011 (May 19, 1975) 38
Grant v. *United States*, 227 U.S. 74 ..... 14, 22, 23, 26, 30, 33
Hale v. *Henkel*, 201 U.S. 43 ..... 40, 41
Harris, Matter of, 221 U.S. 274 ..... 15, 26
Hoffman v. *United States*, 341 U.S. 479 41–42
Johnson v. *United States*, 228 U.S. 457 21
McAlister v. *Henkel*, 201 U.S. 90 40

Cases—Continued

Page
Murphy v. *Waterfront Comm'n.*, 378 U.S. 52 25
Rogers v. *United States*, 340 U.S. 367 41
Schmerber v. *California*, 384 U.S. 757 ..... 16, 33–34, 35
Shapiro v. *United States*, 335 U.S. 1 20
United States v. *Bisceglia*, No. 73-1245, decided February 19, 1975 19
United States v. *Boccuto*, 175 F. Supp. 886, appeal dismissed, 274 F. 2d 860 41
United States v. *Cohen*, 388 F. 2d 464 ..... 29, 30
United States v. *Dionisio*, 410 U.S. 1 34
United States v. *Goldfarb*, 328 F. 2d 280, certiorari denied, 377 U.S. 976 ..... 37, 41
United States v. *Grunewald*, 233 F. 2d 556, reversed, 353 U.S. 391 25
United States v. *Judson*, 322 F. 2d 460 41
United States v. *Kovel*, 296 F. 2d 918 37
United States v. *Mara*, 410 U.S. 19 34
United States v. *Onassis*, 125 F. Supp. 190 20
United States v. *Threlkeld*, 241 F. Supp. 324 37
United States v. *White*, 322 U.S. 694 ..... 13, 20, 21, 22, 33, 34, 40–41
United States v. *White*, 477 F. 2d 757, affirmed *per curiam*, 487 F. 2d 1335 *(en banc,)* certiorari denied, 419 U.S. 872 ..... 28, 29, 36
United States v. *Widelski*, 452 F. 2d 1, certiorari denied, 406 U.S. 918 ..... 28, 30
United States v. *Zakutansky*, 401 F. 2d 68, certiorari denied, 393 U.S. 1021 28
Warden v. *Hayden*, 387 U.S. 294 ..... 33, 34
Wheeler v. *United States*, 226 U.S. 478 ..... 22, 23, 26, 30, 33
Wilson v. *United States*, 221 U.S. 361 ..... 20, 22
Ziegler v. *United States*, 174 F. 2d 439, certiorari denied, 338 U.S. 822 41

	Page
Constitution and statutes:	
United States Constitution:	
Fourth Amendment	8, 20
Fifth Amendment	2, 3, 4, 8, 9, 11, 12, 13, 14, 16, 17, 19, 20, 23, 24, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42
Sixth Amendment	39
Internal Revenue Code of 1954 (26 U.S.C.):	
Sec. 7402(b)	19
Sec. 7602	3–4, 7, 18–19
Sec. 7604(a)	19
63 Pennsylvania Statutes Ann., Sec. 9.11	27
Miscellaneous:	
American Bar Association, Code of Professional Responsibility, Disciplinary Rule 4–2	38
VIII Wigmore, *Evidence* (McNaughton rev., 1961):	
Sec. 2263	35
Sec. 2270	41
Sec. 2307	36
Sec. 2317	37

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74–611

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

C. D. KASMIR AND JERRY A. CANDY

No. 74–18

SOLOMON FISHER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FIFTH AND THIRD CIRCUITS

BRIEF FOR THE PETITIONERS IN NO. 74–611 AND FOR THE RESPONDENTS IN NO. 74–18

OPINIONS BELOW

No. 74–611. The order of the district court (Pet. App. A 1A) is not reported. There is no written opinion of the district court. The opinion of the court of appeals (Pet. App. B 2A–23A) is reported at 499 F. 2d 444.

No. 74–18. The memorandum and order of the district court (Pet. App. A A1–A7) are reported at 352 F. Supp. 731. The opinion of the court of appeals (Pet. App. B A8–A44) is reported at 500 F. 2d 683.

JURISDICTION

No. 74–611. The judgment of the court of appeals (Pet. App. C 24A) was entered on August 21, 1974. The petition for a writ of certiorari was filed on November 18, 1974, and was granted on January 27, 1975. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

No. 74–18. The judgment of the court of appeals was entered on June 7, 1974. The petition for a writ of certiorari was filed on July 26, 1974, and was granted on January 27, 1975. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. *Nos. 74–611 and 74–18.* Whether the Fifth Amendment privilege against self-incrimination may be invoked as a ground for refusing to comply with an internal revenue summons requiring the production of an accountant's workpapers relating to the preparation of the claimant's prior tax returns, where, upon their becoming aware that the claimant was the subject of a tax investigation, the accountant handed over the papers to the claimant, who then turned them over to his attorney.

2. *No. 74–611.* If the client's privilege against self-incrimination is available as a bar to production of

his accountant's workpapers in these circumstances, whether the claimant's attorney can properly invoke his client's privilege.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent portion of the Fifth Amendment of the United States Constitution states:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

Section 7602 of the Internal Revenue Code of 1954, 26 U.S.C. 7602, provides in pertinent part as follows:

> SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.
>
> For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax * * * or collecting any such liability, the Secretary or his delegate is authorized—
>
> (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
>
> (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to ap-

pear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

STATEMENT

These consolidated cases present the identical question whether the Fifth Amendment privilege against self-incrimination may be invoked as a ground for refusing to comply with an internal revenue summons requiring the production of an accountant's workpapers relating to the preparation of the claimant's prior tax returns. In both cases, the accountant handed over his workpapers to the claimant who then turned them over to his attorney, after the commencement of a tax investigation of the claimant. In No. 74–611, the Fifth Circuit held that the Fifth Amendment was available to bar production of such workpapers. In No. 74–18, the Third Circuit upheld the government's position that the privilege is not applicable. Because of the Fifth Circuit's holding as to the availability of the privilege, there is a second question presented in No. 74–611 concerning the attorney's standing to invoke his client's claim of privilege.

That court further held that the claimant's attorney can invoke his client's privilege.

In view of the common issue, the Court has consolidated these cases for argument. Accordingly, in order to present our argument in the factual context of both cases, we are filing this single brief for the government, as petitioner in No. 74–611, and as respondent in No. 74–18.

No. 74–611. On January 3, 1973, two special agents of the Internal Revenue Service interviewed Dr. Edward Mason in his office. The agents advised Dr. Mason that his income tax returns for the years 1969, 1970, and 1971 were under investigation and gave him *Miranda* warnings. They thereupon conducted a two-hour interview of Dr. Mason concerning his personal background, financial dealings and the manner in which his records were kept. During the visit, one of the agents requested permission to examine Mason's personal books and records and Dr. Mason complied with the request. The agent only casually examined the records to ascertain whether they were complete and he stated that he thought some were missing. Dr. Mason replied that if any records were missing, they would be at the accountant's office (Pet. App. B 2A–3A; A. 38–39).

Dr. Mason thereupon called his accountant, Jerry A. Candy, whose firm had been retained by him and his wife to prepare their tax returns for the years 1969, 1970, and 1971. Candy advised Dr. Mason not to show his records to the agents. After his telephone

578-571—75——2

conversation with Candy, Dr. Mason initially stated to the agents that he was undecided whether or not to furnish his records to them. However, he ultimately followed his accountant's advice and denied them further access to his records (Pet. App. B 3A; A. 39–40).

Following Dr. Mason's telephone call, his accountant Candy immediately called C. D. Kasmir, an attorney, and informed him of the situation (A. 52, 60). Kasmir had not previously represented Dr. Mason. However, Kasmir promptly telephoned Dr. Mason and advised him not to say anything or to give the agents any records. During this telephone call, Dr. Mason retained Kasmir as his legal representative (A. 61–62). Immediately after speaking to Kasmir, Dr. Mason withdrew the records which he had placed before the agents and terminated the interview at approximately four o'clock in the afternoon (Pet. App. B 3A; A. 41).

Early the next morning, at 7:30 a.m., Candy delivered an assortment of records and documents to the office of Dr. Mason (A. 53). These records included the workpapers of the accounting firm which employed Candy and miscellaneous documents relating to the preparation of Dr. Mason's income tax returns for 1969, 1970 and 1971.[1] Dr. Mason signed a receipt for the records and immediately turned them over to

[1] The accountant testified that the records turned over to Dr. Mason included accountant's workpapers, and other miscellaneous data and correspondence described in the summons (A. 56).

Kasmir, who had arranged to be present at Dr. Mason's office that morning (A. 61). Later that same day, Special Agent Mabrey called the accountant Candy to arrange a meeting to examine his records with respect to the preparation of Dr. Mason's tax returns. The accountant told Mabrey that he did not have the records he was seeking, and that they were in the possession of Kasmir (A. 47).

On the following day, Agent Mabrey served internal revenue summonses on Candy and Kasmir pursuant to Section 7602 of the Internal Revenue Code of 1954 (A. 46, 81–84). The summons to Kasmir (A. 83) sought the production of specified records of the accounting firm which had been turned over to him the previous morning (A. 53).[2] The summons to Candy (A. 81) sought his testimony concerning these workpapers and documents. Both Candy and Kasmir appeared before Agent Mabrey but refused to comply with the summonses (A. 43). Candy stated that he was not in possession of any of the records sought by

[2] The documents and records sought by the summons were as follows (A. 81, 83):

1. Accountant's workpapers pertaining to Dr. E. J. Mason's books and records of 1969, 1970 and 1971.

2. Retained copies of E. J. Mason's income tax returns for 1969, 1970 and 1971.

3. Retained copies of reports and other correspondence between Tannebaum Bindler & Lewis and Dr. E. J. Mason during 1969, 1970 and 1971.

As the court of appeals noted (Pet. App. B 3A, n. 1), the government did not seek production of the documents which Dr. Mason permitted the agents to examine during their initial visit.

the summons at the time it was served upon him and invoked the attorney-client privilege in refusing to answer any questions (A. 85). Kasmir relied upon the attorney-client privilege and the Fourth and Fifth Amendments in refusing to produce the records (Pet. App. B 3A–4A; A. 86).

Upon Candy's and Kasmir's refusal to comply with the summonses, the government and Special Agent Mabrey commenced this enforcement action in the United States District Court for the Northern District of Texas (A. 4–8). An affidavit of Special Agent Mabrey submitted to the district court stated that: "It is necessary to examine the books, records and other papers demanded by the summonses * * * [in] order to ascertain the correctness of income tax returns filed by Edward J. Mason and Rae A. Mason for the years 1969 through 1971" (A. 8). After a hearing, at which Candy testified that it was not his practice, as an accountant, to turn over such records at the request of a client (A. 54), the district court ordered the summonses enforced, directing Kasmir to produce the records and Candy to testify concerning them. The court found that the records sought belonged to the accounting firm, that the taxpayer could not "make them a part of his records by requesting the accountant to deliver them to him," and that the records were in the possession of Kasmir at the time of the service of the summons (Pet. App. A 1A; Pet. App. B 3A–4A; A. 77).

With one judge dissenting, the court of appeals reversed the district court's order insofar as it required

Kasmir to produce the documents.[3] While recognizing that the actions of the taxpayer, his accountant and his attorney were an attempt to put the requested records beyond the reach of the Internal Revenue Service, the court held that the taxpayer had acquired rightful possession because the transfer took place prior to service of the summons and that he retained constructive possession of the records after their transfer to the attorney. The court reasoned that the privilege would have been available had the taxpayer retained his accountant's workpapers, and that the taxpayer's rights were not decreased by his transfer of the documents to his attorney (Pet. App. B 13A–15A). The court of appeals further held that even though the taxpayer had not appeared before the district court to claim the privilege against self-incrimination, the attorney had standing to assert his client's Fifth Amendment privilege (Pet. App. B 19A–20A).

The dissenting judge was of the view that a taxpayer has no legitimate expectation of personal privacy with respect to his accountant's workpapers and therefore cannot assert the privilege against self-incrimination to bar their production. He concluded that there was no compulsion against the person of the taxpayer by requiring his lawyer to produce an accountant's records which the accountant placed in the

---

[3] The court of appeals held that under *Couch* v. *United States*, 409 U.S. 322, the government "is entitled to enforcement of the summons served upon accountant Candy for his testimony concerning the sought-after documents" (Pet. App. B 20A).

taxpayer's hands "for a fleeting moment." The dissent further stated that the attorney-client privilege is not available "initially and directly as a strategem or device to place pre-existing documentary evidence beyond the reach of the law" (Pet. App. B 21A–23A).

No. 74–18. In late July 1971, Alan Feldman, a special agent of the Internal Revenue Service, made an appointment with Morris Goldsmith to discuss Goldsmith's tax liability for the years 1969 and 1970. On August 3, 1971, Goldsmith and his wife retained petitioner Solomon Fisher, an attorney, to represent them. Fisher thereupon called Feldman and advised him that Goldsmith would not appear for the appointment. On August 4, 1971, the Goldsmiths obtained certain records and papers from their accountant, Harold Berson, which were compiled by the accountant in connection with the preparation of their tax returns. These records, which dated back as far as 1959, included lists of income and expenses compiled by the accountant from cancelled checks and deposit receipts supplied by the Goldsmiths. They did not, however, include the checks and deposit records themselves. On August 17, 1971, less than two weeks after their receipt of the accountant's workpapers, the Goldsmiths turned them over to Fisher (Pet. App. A A1–A2; Pet. App. B A10–A11: A. 54a).

Subsequently, on October 22, 1971, Special Agent Feldman served a summons on the accountant, Berson, seeking production of records relating to the Goldsmiths' tax liability for the years in question. Berson indicated to the agent that he would attempt to get his

papers back from Goldsmith. However, when Berson appeared to answer the summons, he stated that he did not have the papers sought by Agent Feldman. Thereafter, on December 1, 1971, Agent Feldman served a summons on petitioner Fisher, directing production of the analyses of the Goldsmiths' receipts and disbursements for 1969 and 1970, which were prepared by their accountant, Harold Berson (Pet. App. A A2; Pet. App. B A11; A. 4a–5a).

Upon petitioner Fisher's refusal to permit Agent Feldman to inspect these papers, the government commenced this enforcement action in the United States District Court for the Eastern District of Pennsylvania, seeking compliance with the summons.[4] An affidavit of Agent Feldman appended to the government's petition to enforce the summons stated "[t]hat the testimony, records, documents, papers and information demanded by the summons served upon Solomon Fisher are necessary for the determination of the tax liability of Morris Goldsmith for the years 1969 and 1970" (A. 9a). In response, petitioner Fisher asserted that production of the accountant's workpapers would violate the Goldsmiths' Fifth Amendment privilege against self-incrimination (Pet. App. B A11–A12; A. 13a). At their request (A. 15a–16a), the district court permitted the Goldsmiths to inter-

[4] The summons also sought the production of copies of payroll tax returns for Mr. Goldsmith for the years 1969 and 1970 (A. 4a). However, the agent obtained these items from other sources and they were not sought in this enforcement proceeding (A. 30a).

vene in the proceeding for the purpose of invoking the Fifth Amendment privilege as a bar to Fisher's compliance with the summons (A. 73a).

After a hearing, the district court found (Pet. App. A A7) that the workpapers sought by the summons "were and are the property of the accountant" and that "[t]hey only left his possession after the taxpayer learned of the investigation." The court further found that the attorney-client privilege was not available to protect the accountant's workpapers from disclosure. It ordered enforcement of the summons (Pet. App. A A7).

The court of appeals affirmed after hearing reargument *en banc*. It held that the Fifth Amendment privilege against self-incrimination did not become available to bar production of the summoned workpapers upon the accountant's transfer of them to the Goldsmiths and their transfer of the papers to their attorney after learning of the tax investigation (Pet. App. B A8–A24). In a concurring opinion, Judge Gibbons emphasized the fact that petitioner Fisher's production of the accountant's workpapers would not require the compulsory production of evidence from the Goldsmiths or Fisher of a testimonial or communicative nature but that the papers could be authenticated by other means (Pet. App. A A24–A28). The single dissenting judge concluded that the privilege was available because: (1) the Goldsmiths could have asserted the privilege while their accountant's workpapers were in their possession; and (2) they maintained "constructive possession" over the papers upon

their transfer of them to their attorney. He would have vacated the judgment and remanded the case to the district court to determine whether the Goldsmiths had rightful possession of the accountant's workpapers (Pet. App. B A28–A44).

SUMMARY OF ARGUMENT

I

The principal issue in these cases involves the enforceability of internal revenue summonses seeking the production of workpapers originating with and belonging to accountants—papers which pertained to the accountants' preparation of their clients' tax returns. In our view, neither the transfer of the accountant's workpapers to the client nor their subsequent transfer by the client to his attorney created a privilege against self-incrimination which did not theretofore exist. As the Court reaffirmed in *Couch* v. *United States,* 409 U.S. 322, the Fifth Amendment privilege against self-incrimination is an intimate and personal right. Where the Court has extended the privilege to cover documentary evidence, it has repeatedly emphasized that only personal records are eligible for the claim. These decisions reflect the Court's consistent view that the privilege should be "limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records" (*United States* v. *White,* 322 U.S. 694, 701).

Under the standards developed in this Court's decisions, the accountant's workpapers at issue are not the

578-571—75——3

personal papers of the client and are therefore not subject to a claim of the privilege on behalf of the client. On numerous occasions, the Court has held that the Fifth Amendment is no bar to the required production of third-party records that might incriminate the claimant. Such third-party records cannot be transformed into the claimant's personal records simply by placing them in his custody. In determining whether records in the possession of the claimant are subject to the privilege, the Court has looked to the essential character of the documents, notwithstanding even claims by individuals to their legal title. For example, in *Grant* v. *United States,* 227 U.S. 74, the Court held that records of a dissolved corporation in the possession of an individual shareholder pursuant to his claim of exclusive title were not subject to the privilege against self-incrimination because the documents retained their "essential character" as corporate documents.

Similarly, in *Bellis* v. *United States,* 417 U.S. 85, the Court concluded that a member of a dissolved partnership could not claim the privilege to avoid producing partnership records which he had appropriated to his own possession prior to the issuance of a grand jury subpoena. The Court held that the records remained partnership records and that the claimant (and co-owner of the records) accordingly was holding them in a representative capacity rather than as his own private or personal papers.

Thus, even if the accountants in the present cases had transferred title in their workpapers to their cli-

ents, the privilege would not have become available, since the transfer of title would not have converted the accountant's papers to private papers of the taxpayer. *A fortiori,* where, as in each of these cases, the accountant simply handed over his workpapers to the taxpayer pursuant to what could at best be described as a gratuitious bailment and the taxpayer held them for only a brief period, the transfer could not have created a privilege which did not exist prior to the transfer to the taxpayer.

It would ill serve the policy underlying the privilege if a person under investigation could gather documentary evidence into his possession from third parties and then claim the privilege against self-incrimination with respect to such material. If the privilege could become available by means of such a simple expedient, the distinction developed by the Court between third-party records and private papers would be rendered meaningless. As Mr. Justice Holmes admonished for a unanimous Court in *Matter of Harris,* 221 U.S. 274, 279–280, "The right not to be compelled to be a witness against oneself is not a right to appropriate property that may tell one's story." Since the accountant's workpapers (compiled from unprivileged information previously disclosed to him by the client) are not the client's private papers, the client has no greater right to withhold them from proper legal process than does the custodian of corporate, organizational or partnership records or the possessor of any other pertinent unprivileged evidence.

2. The unavailability of the privilege against self-incrimination to convert accountant's workpapers to the client's private papers is further demonstrated by this Court's decision in *Schmerber* v. *California*, 384 U.S. 757. There, the Court held that the uncon-tested taking of a blood sample from a person under arrest for the purpose of conducting a chemical analysis of its alcoholic content was not barred by the privilege even though such evidence might serve to incriminate the accused. The Court stated that "[t]he distinction which has emerged * * * is that the privilege is a bar against compelling 'communications' or 'testimony' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it" (384 U.S. at 764). As in *Schmerber*, the production of the accountant's workpapers in these cases would not require the taxpayers to make any self-incriminating disclosures of a testimonial or communicative nature. In complying with the summonses, the taxpayers would not be authenticating the workpapers or testifying about them in any manner. Indeed, only the accountants could provide authentication and their testimony would not violate the taxpayers' Fifth Amendment privilege. Since it is only compulsion of testimony by the claimant which is prohibited by the Fifth Amendment, the privilege is unavailable to bar enforcement of the summons in this case.

3. The courts below properly recognized that no independent basis for the privilege against self-incrimination existed as a result of the taxpayers' transfer

of the workpapers to their attorneys. The availability of the privilege depends upon whether the taxpayer's initial possession of the accountant's workpapers was a sufficient basis for invoking the privilege. If, as we submit, it was not, the taxpayer's transfer of the accountant's workpapers to his attorney would not provide him with any greater protection under the Fifth Amendment.

Similarly, the courts of appeals correctly recognized that the attorney-client privilege is not available to bar production of the accountants' workpapers. That privilege applies only to confidential communications between attorney and client. Here, the accountants' workpapers did not constitute confidential communications between the taxpayers and their attorneys. They contain unprivileged information disclosed by the taxpayer to the accountant long before the commencement of any attorney-client relationship.

II

After concluding that the accountant's workpapers were protected by the taxpayer's privilege against self-incrimination, the court of appeals in No. 74–611 further held that the claimant's attorney could properly invoke his client's privilege. The question whether the claimant's attorney can properly invoke the client's Fifth Amendment privilege need be reached in No. 74–611 only if the Court concludes that the privilege is available with respect to the accountant's workpapers. Assuming *arguendo* that the privilege is available under these circumstances, we believe that there are important practical reasons why an attorney should not be able to invoke his client's privilege against self-

incrimination—at least where, as here, the client is available to intervene and assert the claim himself.

The privilege against self-incrimination is not an automatic bar to the securing of evidence but, like other privileges, may freely be waived by the person entitled to claim it. Moreover, a claim of the privilege need not be accepted on its face. In appropriate circumstances, the court may inquire into the basis of the claim. With respect to documentary evidence there may be need for a factual determination whether the documents sought are the private papers of the claimant. For all of these reasons, the claimant should be required to come forward and assert the privilege himself, and to answer pertinent questions of the court and counsel concerning the factual basis of the claim.

ARGUMENT

I. THE CLIENT'S PRIVILEGE AGAINST SELF-INCRIMINATION IS NOT A BAR TO REQUIRED PRODUCTION OF HIS ACCOUNTANT'S WORKPAPERS WHICH HAVE BEEN PLACED IN THE CLIENT'S POSSESSION AND THEN TURNED OVER BY THE CLIENT TO HIS ATTORNEY

A. THE PRIVILEGE AGAINST SELF-INCRIMINATION DOES NOT APPLY TO POSSESSORY INTERESTS IN DOCUMENTS WHICH ARE NOT HELD IN A PURELY PERSONAL CAPACITY

1. The issue raised in these cases is of major importance to the conduct of federal tax investigations by the Internal Revenue Service. In Section 7602 of the Internal Revenue Code of 1954, Congress has authorized the Secretary of the Treasury or his delegate, in discharging his responsibility to administer and enforce the revenue laws "[t]o examine any books, papers, records, or other data which may be relevant or material to such inquiry; * * * [and] [t]o summon * * * any person having possession, custody, or care of books of account * * * or any other person * * * to appear before the Secretary * * * at a time and place named in the summons and to produce such books, papers, records, or other data, * * * as may be relevant or material to such inquiry * * *." Such summonses are administratively issued, and the Internal Revenue Service can seek their enforcement in the federal courts. Sections 7402(b) and 7604(a) of the Code. As the Court observed in *United States* v. *Bisceglia,* No. 73–1245, decided February 19, 1975, slip op. 5, "[t]he purpose of the statutes is not to accuse, but to inquire. Although such investigations unquestionably involve some invasion of privacy, they are essential to our self-reporting system * * *."

While records sought by an internal revenue summons may tend to incriminate the taxpayer under investigation, the decisions of this Court have established that the Fifth Amendment privilege against self-incrimination is not available to prevent the compulsory production of documents unless they are the private papers of the claimant and are in his possession. These decisions reflect the Court's consistent view that the privilege should be "limited to its historic function of protecting only the natural individ-

ual from compulsory incrimination through his own testimony or personal records." *United States* v. *White,* 322 U.S. 694, 701.

In *Couch* v. *United States,* 409 U.S. 322, 327, 328, the Court reaffirmed that the Fifth Amendment privilege is an "intimate and personal" right which "adheres basically to the person, not to information that may incriminate him." In referring to its previous holding in *Boyd* v. *United States,* 116 U.S. 616, that a person could not be compelled to produce his private papers [5] that might tend to incriminate him, the Court there pointed out that "[a] later Court commenting on the *Boyd* privilege noted that 'the papers and effects which the privilege protects must be the private property of the person claiming the privilege, *or at*

[5] Petitioners in No. 74–18 attempt to characterize (Br. 18) the holding in *Boyd* as extending the privilege to records prepared by a third party. However, while the document sought in *Boyd* was an invoice issued to the claimant's partnership by a third party, the Court has subsequently explained that the question whether the invoice was a private business record was not raised in that case. *Bellis* v. *United States*, 417 U.S. 85, 95, n. 2. It was treated as private by the parties (with the government arguing instead that the privilege did not apply to *in rem* proceedings, see *Shapiro* v. *United States*, 335 U.S. 1, 33, n. 42). "The Court therefore decided the case on the premise that it involved the 'compulsory production of a man's private papers.'" 417 U.S. at 95, n. 2. Thus, in extracting the essential passage from the *Boyd* decision which was descriptive of its holding, the Court in *Couch* cited *Boyd* as deciding that "any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime" (116 U.S. at 630) would violate the Fourth and Fifth Amendments. See 409 U.S. at 330. See also *Wilson* v. *United States*, 221 U.S. 361, 380; *United States* v. *Onassis*, 125 F. Supp. 190, 208 (D. D.C.).

least in his possession in a purely personal capacity.' United States v. *White,* 322 U.S. 694, 699 (1944) (Emphasis added.)" 409 U.S. at 330, n. 10. Since *Boyd* did not "address or contemplate the divergence of ownership and possession" (409 U.S. at 330), the Court rejected its application in *Couch,* where the owner of books and records had transferred them to an accountant. In these circumstances, the Court concluded, "the ingredient of personal compulsion against an accused is lacking" (409 U.S. at 329) and the taxpayer-claimant therefore could not invoke the privilege as a bar to the compelled production of her records by the accountant.

While *Couch* involved absence of possession by the claimant of documents owned by him, the privilege is similarly unavailable in the converse situation where the claimant has physical possession but cannot assert that they are his own personal papers. In these circumstances, the claimant's possession is custodial rather than personal.[6] Accordingly, as was recently noted in *Bellis* v. *United States,* 417 U.S. 85, 88–90, a long line of this Court's decisions holds that an individual cannot rely upon the privilege to avoid producing the records of a collective entity (such as a corporation, unincorporated association or partnership) which are in his possession in a representative capac-

[6] Of course, if the claimant can assert neither possession nor ownership of papers, they are simply third-party records with respect to which the privilege is unavailable. See, *e.g., Donaldson* v. *United States*, 400 U.S. 517, 537 (Douglas, J., concurring); *California Bankers Assn.* v. *Shultz*, 416 U.S. 21, 55. See also *Johnson* v. *United States*, 228 U.S. 457, 458.

ity, even if those records would incriminate him personally. See, *e.g., United States* v. *White, supra; Wilson* v. *United States,* 221 U.S. 361.

2. In applying the rule that records in the possession of the claimant are not subject to the privilege unless he can demonstrate that they are his personal papers, the Court has been careful to classify documents in accordance with their essential character, notwithstanding claims by individuals to legal title of the documents. For example, in *Wheeler* v. *United States,* 226 U.S. 478, 482–483, and *Grant* v. *United States,* 227 U.S. 74, 76–77, where corporations had been dissolved by the time the subpoenas had been served and individual shareholders asserted ownership rights in the corporate records sought,[7] the Court nevertheless rejected their claims of privilege. It held that the documents retained their "essential character" as corporate documents (226 U.S. at 490; 227 U.S. at 80) and "were still impressed with the incidents attending corporate documents" (226 U.S. at 490), and therefore did not qualify as private papers. This was the case even though the individual then in possession (or constructive possession, in *Grant*) of them also claimed, and was assumed by the Court, to be their owner (226 U.S. at 490; 227 U.S. at 80).

Similarly, in *Bellis* v. *United States, supra,* a member of a dissolved partnership could not claim the privilege to avoid production of records belonging to his former partnership which he had appropriated to his

[7] In *Grant*, the subpoena was served on the attorney for the corporation's sole stockholder. See 227 U.S. at 76–77.

own possession prior to the issuance of a grand jury subpoena. This Court held that the records remained partnership records, in which the other partners had important legal rights, and that the claimant accordingly was holding them in a representative capacity rather than as his own private or personal papers (see 417 U.S. at 97–99).

Wheeler, Grant, and *Bellis* establish that documents do not become "private" or "personal" for Fifth Amendment purposes merely because the claimant physically possesses them, even if that possession is under a claim of title. Here, the records at issue are accountants' workpapers which were created by the taxpayer's accountant in each case and were owned and maintained by the accountant until the commencement of the investigations. They obviously were not private papers of the taxpayers and, we submit, did not become so upon being handed over by the accountants to the taxpayers or upon being handed over by the latter to their attorneys. We turn now to a detailed consideration of the essential character of the papers at issue and whether their transfers effected a change in that character for purposes of the Fifth Amendment.

B. THE CLIENT'S PRIVILEGE AGAINST SELF-INCRIMINATION DOES NOT EXTEND TO ACCOUNTANT'S WORKPAPERS WHICH ARE PLACED IN THE CUSTODY OF THE TAXPAYER-CLIENT

1. The court of appeals in No. 74–611 correctly acknowledged (Pet. App. B 13a) that the taxpayer could have claimed no privilege of self-incrimination

in the accountant's workpapers had the summons been served while they were held by the accountant. *Couch* established that a taxpayer's own books and records are not protected when they are in the possession of an accountant, and it follows *a fortiori* that compelled production of accountant's workpapers which belonged to the accountant and were never in the possession of the taxpayer-claimant would not constitute "extortion of information from the accused himself that offends our sense of justice." *Couch* v. *United States, supra,* 409 U.S. at 328. Indeed, this result is merely an application of the well-settled rule that third-party records are not subject to a claim of privilege. See n. 6, *supra.* Simply put, "[t]here is no right to be free from incrimination by the records or testimony of others." *Donaldson* v. *United States, supra,* 400 U.S. at 537 (Douglas, J., concurring).[8]

Although there is no dispute concerning the correctness of the preceding proposition, the Fifth Circuit went on to state that: "It is likewise clear from *Couch* that at the time the taxpayer obtained actual possession of the records, the day before the summons was served, he was in the position to assert his Fifth Amendment privilege, if the summons had then been served" (Pet. App. B 13A). In the court of appeals' view, had the taxpayer at that point placed the ma-

[8] There is of course no confidential accountant-client privilege under federal law and no state-created privilege has been recognized in federal cases. See *Couch* v. *United States, supra,* 409 U.S. at 335, and cases cited therein.

terial in a safe under his control, "he could have successfully invoked the privilege by relying upon his constructive possession" (*ibid.*).

This statement by the court of appeals in No. 74–611 seriously misinterprets the teaching of *Couch.* That case dealt with books and records which belonged to and originated with the taxpayer, and as to which the privilege presumably would have been available to her had she not relinquished possession of them. See 409 U.S. at 334 n. 18. In rejecting her claim of privilege with respect to records of the taxpayer which she had disclosed to her accountant and permitted him to maintain continuously in his possession, the Court emphasized that the accountant, and not the taxpayer, was the only person who would be subject to the compulsion of the summons. Once the taxpayer had voluntarily removed her records from that "'private enclave where [she] may lead a private life * * *'" (*Murphy* v. *Waterfront Comm'n.,* 378 U.S. 52, 55, quoting *United States* v. *Grunewald,* 233 F. 2d 556, 581–582 (C.A. 2) (Frank, J., dissenting), reversed, 353 U.S. 391), "the ingredient of personal compulsion against an accused [was] lacking" (409 U.S. at 329). See 409 U.S. at 338 (Brennan, J., concurring).

While the lack of possession by the owner of documents was significant in the circumstances presented in *Couch,* the Court's opinion in that case does not support the converse conclusion of the court of appeals in No. 74–611 that physical possession alone is a sufficient basis for invoking the privilege with re-

spect to documentary evidence.[9] It would ill serve the policy underlying the privilege if a person under investigation could gather documentary evidence into his possession from third parties and then claim the privilege against self-incrimination with respect to such material. If the privilege could become available by means of such a simple expedient, the distinction developed by the Court between third-party records and private papers would be rendered meaningless. As Mr. Justice Holmes admonished for a unanimous Court in *Matter of Harris,* 221 U.S. 274, 279–280, "[t]he right not to be compelled to be a witness against oneself is not a right to appropriate property that may tell one's story."

Indeed, the present cases would appear to follow *a fortiori* from *Wheeler* v. *United States,* 226 U.S. 478, and *Grant* v. *United States,* 227 U.S. 74, which held that even if the claimant could assert both a proprietary and a possessory interest in documents which are not his personal papers, such documents are not subject to a claim of the privilege. That principle was in no way repudiated by *Couch* and was subsequently reaffirmed in *Bellis* v. *United States, supra,* 417 U.S. at 97, n. 8, as the basis for denying a claim of privilege by a co-owner in possession of the records of a partnership or other unincorporated association. And in *Grant, supra,* the records of a dissolved corporation which were in the possession of its

[9] Indeed, the present cases, no less than *Couch*, involve "the divergence of ownership and possession" (409 U.S. at 330). See n. 10, *infra.*

sole shareholder under a claim of exclusive title were held not subject to the privilege because of their "essential character" as corporate documents. Thus, even if the accountants in the present cases had transferred title in their workpapers to the taxpayer, the privilege would not have become available; the transfer of title would not have converted the character of the accountants' workpapers to the private papers of the taxpayer. Here, where the accountant in each case simply handed over his workpapers to the taxpayer pursuant to what could at best be described as a gratuitous bailment,[10] the transfer surely could not create

[10] There was no transfer of title of the accountant's workpapers in either of these cases. In No. 74–611, the district court found that the records at issue "belong to the accounting firm of Tannebaum, Binder and Lewis and are in possession of the respondent, C. D. Kasmir * * *" (A. 93). This finding was left undisturbed by the court of appeals. Indeed, the only evidence of the transfer of the accountant's workpapers to the taxpayer was a receipt addressed to the accountant and signed by the taxpayer, which stated as follows (A. 89):

"Please accept this as receipt for the following files of Dr. E. J. Mason: 1969, 1970 and 1971 Tax Files, Quarterly Tax Files, and Bookkeeping Files. 1970 and 1971 Financial Statements Files and 1969 Cash Disbursements.

"(s) E. J. Mason
"Dr. E. J. Mason."

Similarly, in No. 74–18, the district court found that the workpapers "were and are the property of the accountant" (Pet. App. A A7). While the accountant Berson had testified (A. 55a) that he believed the papers belonged to the Goldsmiths, the court found it was not bound by such assertions (Pet. App. A A6). Indeed, Section 9.11, 63 Pennsylvania Statutes Ann., specifically requires that an accountant's "statements, records, schedules, working papers and memoranda * * * remain the property of such certified public accountant in the absence of an express agreement between the certified public accountant and the client to the contrary." Nothing in the record supports the existence of such an agreement between Berson and the Goldsmiths.

a privilege which theretofore did not exist.[11] The Fifth Circuit in No. 74–611 therefore erred in concluding that the accountant's workpapers would have been privileged in the hands of the taxpayer.

In light of the foregoing, it is not surprising that, apart from the decision below in No. 74–611, the federal appellate courts that have considered the applicability of the privilege to accountant's workpapers transferred to the taxpayer or his attorney either directly or indirectly have, with a single exception, uniformly rejected any claim of privilege on behalf of the taxpayer.[12] Like the dissenting judge in No. 74–611, we see little difference between the facts here and the situation where a taxpayer arranges for his

[11] The court of appeals' further statement in No. 74–611 (Pet. App. B 13A) that if the taxpayer had placed his accountant's workpapers in a safe he could have invoked the privilege by relying upon his constructive possession is premised upon its erroneous initial assumption that the taxpayer's physical possession was a sufficient basis for invoking the privilege.

[12] In addition to the decision below in No. 74–18, see *e.g.*, *Deck* v. *United States*, 339 F.2d 739 (C.A.D.C.) (workpapers transferred first to the taxpayer and then to his attorney); *United States* v. *Zakutansky*, 401 F.2d 68 (C.A. 7), certiorari denied, 393 U.S. 1021 (accountant's workpapers transferred to taxpayer); *United States* v. *Widelski*, 452 F.2d 1 (C.A. 6), certiorari denied, 406 U.S. 918 (accountant's workpapers transferred to taxpayer); *United States* v. *White*, 477 F.2d 757 (C.A. 5), affirmed *per curiam*, 487 F.2d 1335 (*en banc*), certiorari denied, 419 U.S. 872 (accountant's workpapers transferred to attorney).

accountant to transfer the accountant's workpapers directly to his attorney—a situation in which the Fifth Circuit reached the opposite result in *United States* v. *White*, 477 F.2d 757, affirmed *per curiam*, 487 F.2d 1335 (*en blanc*), certiorari denied, 419 U.S. 872. The fact that the papers here, unlike those in *White*, momentarily passed through the hands of the taxpayer in their journey from the accountant to the attorney is, in the words of the dissent below, a distinction "exalting form over substance * * *" (Pet. App. B 23A). The availability of the privilege against self-incrimination should not turn upon such a purely formalistic distinction.

The single contrary appellate authority is *United States* v. *Cohen*, 388 F.2d 464 (C.A. 9). There, in anticipation of an internal revenue summons, the taxpayer had acquired his accountant's workpapers and thereafter claimed the privilege. Relying upon the testimony of the accountant that he considered all papers relating to his client's affairs to be theirs to command and that it was his unvarying practice to deliver such papers to the client when requested, the Ninth Circuit upheld the claim of the privilege, concluding that the taxpaper's possession "[could] not fairly be characterized as wrongful" (388 F.2d at 470).

While the present cases can be distinguished factually from *Cohen* on the basis of the practice of the accountant with respect to his workpapers *vis-a-vis* his client, the ownership of the papers, and the nature

of the taxpayer's possession of the papers,[13] we believe that the Ninth Circuit's decision is erroneous on the broader ground that accountant's workpapers cannot be transformed into the private papers of his client.[14] As we have pointed out *supra,* pp. 22–23, the decisions of this Court in *Grant, Wheeler,* and *Bellis* have made it clear that the question is not whether the claimant's

[13] In No. 74–611, the accountant testified that it was not his practice to turn over his workpapers at the request of a client (A. 54). Moreover, the district court found that the accounting firm continued to own the records (A. 93). Finally, the taxpayer's possession of his accountant's workpapers was only momentary since he immediately passed them on to his attorney, Kasmir.

While the taxpayers in No. 74–18 held their accountant's workpapers for 12 days before passing them on to their attorney, the court of appeals correctly described that possession as "fleeting and transitory" (Pet. App. B A24). Moreover, while petitioners emphasize (Br. 20–22) the accountant's testimony in No. 74–18 that he would regularly turn over an accumulation of records and papers to his clients every few years (A. 53a), some of the papers that he turned over to them in August 1971 dated back to the year 1959 (A. 54a). There, as in No. 74–611, the district court found that the records continued to be the property of the accountant even after the transfer (Pet. App. A A6–A7).

[14] The reference to *Cohen* by this Court in *Couch, supra,* 409 U.S. at 330, n. 12, noted that "the Ninth Circuit's linkage of possession to the purposes served by the privilege was appropriate." But the Court further noted (*ibid.*) that it was not deciding "what qualifies as rightful possession enabling the possessor to assert the privilege." On the latter issue the Ninth Circuit's view has been criticized by other courts of appeals. See *United States* v. *Widelski,* 452 F. 2d 1, 5 (C.A. 6), certiorari denied, 406 U.S. 918, and cases cited therein. Moreover, the Ninth Circuit's statement in *Cohen* that the privilege does not depend upon "the degree of privacy which attended the creation or maintenance of particular records" (388 F. 2d at 471) is contrary to both *Couch* and *Bellis.*

possession of the documents is wrongful as petitioners in No. 74–18 suggest (Br. 20–21), but whether they are his private papers. Contrary to petitioners' argument in No. 74–18 (Br. 17–20), workpapers prepared by an outside accountant are not private papers of the client to whom they pertain.[15] The mere fact that such records may reflect the taxpayer's financial transactions does not in itself create a Fifth Amendment privilege to bar their disclosure. See, *e.g., Couch* v. *United States, supra; California Bankers Assn.* v. *Shultz,* 416 U.S. 21; *Donaldson* v. *United States,* 400 U.S. 517, 537 (Douglas, J., concurring). And, since the workpapers at issue were prepared by the accountants on the basis of information disclosed to them by their taxpayer-clients for purposes of preparation of the clients' tax returns, the following analysis by this Court in *Couch* concerning a taxpayer's own records furnished to an accountant for those purposes is at least equally applicable here (409 U.S. at 335–336, footnote omitted):

> * * * [T]here can be little expectation of privacy where records are handed to an ac-

[15] Petitioners in No. 74–18 argue (Br. 18) that documents can be the private papers of the claimant even if they are written by another person. We do not contend to the contrary. However, for purposes of the Fifth Amendment, there is a difference between records prepared by the taxpayer's full-time employee with respect to which he does not relinquish possession and control in a non-privileged relationship and records prepared by an outside accountant. See *Couch* v. *United States, supra,* 409 U.S. at 334–335 and n. 18. Contrary to petitioner's argument in No. 74–18 (Br. 17), the Court in *Couch* deemed it "significant" that "the accountant himself worked neither in petitioner's office nor as her employee" (409 U.S. at 334 and n. 18).

countant, knowing that mandatory disclosure of much of the information therein is required in an income tax return. What information is not disclosed is largely in the accountant's discretion, not petitioner's. Indeed, the accountant himself risks criminal prosecution if he willfully assists in the preparation of a false return. 26 U.S.C. § 7206(2). His own need for self-protection would often require the right to disclose the information given him. Petitioner seeks extensions of constitutional protections against self-incrimination in the very situation where obligations of disclosure exist and under a system largely dependent upon honest self-reporting even to survive. Accordingly, petitioner here cannot reasonably claim, either for Fourth or Fifth Amendment purposes, an expectation of protected privacy or confidentiality.

Moreover, the Court noted in *Couch* that no confidential accountant-client privilege exists under federal law and no state-created privilege has been recognized in federal cases (see 409 U.S. at 335, and cases cited therein). Thus, whether the accountant's workpapers are in the hands of his client or of the accountant, the client cannot prevent his accountant from testifying about them or claim a privilege of confidential communication to prevent their production, because the law does not recognize any significant interest of privacy by the client in his accountant's workpapers.

There is no reason for a different rule under the Fifth Amendment—a rule that would protect from production accountant's workpapers in the hands of

the client, even though the client could not prevent his accountant's testimony with respect to such records or the information they contain. The transfer of the workpapers to the client's custody does not change their essential nature; they remain a compilation by the accountant of unprivileged information previously disclosed to him by the client. Although the client may have a Fifth Amendment privilege to refuse to authenticate the workpapers or testify about their tents (see point 2, *infra,* pp. 33–35), the papers themselves are not converted into part of the "private enclave where he may lead a private life" merely by being placed in his possession. Since they are not his private papers, he has no greater right to withhold them from proper legal process than does the custodian of corporate, organizational or partnership records (see *Wheeler, Grant, White* and *Bellis, supra*) or, indeed, the possessor of any other pertinent evidence (see *Warden* v. *Hayden,* 387 U.S. 294, 302–303).

2. The unavailability of the privilege against self-incrimination to convert accountant's workpapers to the client's private papers is further demonstrated by this Court's decision in *Schmerber* v. *California,* 384 U.S. 757. There, the Court held that the unconsented taking of a blood sample from a person under arrest for the purpose of conducting a chemical analysis of its alcoholic content was not barred by the privilege. Although such evidence may serve to incriminate the accused, the Court stated that "[t]he distinction which has emerged * * * is that the privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the

source of 'real or physical evidence' does not violate it" (384 U.S. at 764). Since admission of the blood test evidence did not involve either testimony or any communicative act or writing by the claimant, it was not barred by the privilege against self-incrimination. See also *Warden* v. *Hayden, supra* (clothing); *United States* v. *Dionisio,* 410 U.S. 1, 5–7 (voice exemplars); *United States* v. *Mara,* 410 U.S. 19, 21–22 (handwriting exemplars).

As in *Schmerber,* the production of the accountants' workpapers in these cases would not require the taxpapers to make any self-incriminating disclosures of a testimonial or communicative nature. (The taxpayers' earlier communications to the accountants, on which the workpapers were based, were, of course, neither privileged nor compelled by the government.) In complying with the summons, the taxpayers would not be authenticating the workpapers or testifying about them in any manner. It is that testimonial compulsion which is prohibited by the Fifth Amendment. As the Court stated in *United States* v. *White, supra,* 322 U.S. at 698 (emphasis added), the privilege "is designed to prevent the use of the legal process to force from the lips of the accused individual the evidence necessary to convict him or *to force him to produce and authenticate any personal documents or effects that might incriminate him.*"

In these cases, only the accountant could provide authentication of his workpapers and his testimonial communication would not violate the taxpayer's privilege against self-incrimination. Indeed, the sole testimonial disclosure which would accompany the tax-

payer's production of the summoned workpapers would be the admission that they were in his possession, a fact that is already admitted and which, in any event, is of no evidentiary significance and would therefore not be incriminating. Accordingly, since "[n]ot even a shadow of testimonial compulsion upon or enforced communication by the accused" (*Schmerber* v. *California, supra,* 384 U.S. at 765) would accompany production of the accountant's workpapers, the privilege is unavailable to bar enforcement of the summons. See also *Couch* v. *United States, supra,* 409 U.S. at 329; Pet. App. B (No. 74–18), pp. A24–A28 (Gibbons, J., concurring below); VIII Wigmore, *Evidence,* § 2263, p. 379 (McNaughton rev., 1961).

C. THE PRIVILEGE AGAINST SELF-INCRIMINATION DOES NOT ARISE AS A RESULT OF THE TAXPAYER'S TRANSFER OF THE ACCOUNTANT'S WORKPAPERS TO HIS ATTORNEY

The foregoing discussion has shown that the privilege against self-incrimination would not have been available if the taxpayers had retained possession of the accountant's workpapers in each case and the summons had been served upon the taxpayers. The remaining question with respect to the production of the accountants' workpapers is whether the taxpayers' transfer of them to their attorneys barred their required production under either the Fifth Amendment or some other legally recognized privilege.

1. The court of appeals in No. 74–611 properly recognized (Pet. App. B 15A–16A) that no independent basis for the privilege against self-incrimination existed as a result of the taxpayer's transfer of the documents to his attorney. As that court stated (Pet.

App. B 15A), "We reject the notion, as we did in *White* [477 F. 2d 757 (C.A. 5), affrmed *per curiam,* 487 F. 2d 1335 (*en banc*)] that a Fifth Amendment privilege in the taxpayer can somehow be *created* when evidence finds its way into [the taxpayer's] attorney's hands" (emphasis in original).

We agree with the court below in No. 74–611 that the transfer of the accountant's workpapers to the attorney should neither enlarge nor decrease whatever Fifth Amendment privilege the taxpayer could originally assert when they were in his possession.[16] See VIII Wigmore, *Evidence* § 2307, pp. 591–594 (McNaughton rev., 1961). Thus, as petitioners in No. 74–18 acknowledge (Br. 23–27), the availability of the privilege depends upon whether the taxpayer's initial possession of the accountant's workpapers was a sufficient basis for invoking the privilege. If, as we have submitted, it was not, the taxpayer's transfer of the accountant's papers to his attorney would not provide him with any greater protection under the Fifth Amendment.

2. The court of appeals in No. 74–611 correctly recognized that the attorney-client privilege is "admittedly not available" to bar production of the accountant's workpapers (Pet. App. B 17A).[17] That

[16] Thus, if the taxpayer had transferred his own private papers to his attorney for purposes of preparing his defense, the Fifth Amendment privilege would have protected them from disclosure.

[17] Respondents in No. 74–611 conceded in their brief in the court of appeals (p. 7, n. 1) that the attorney-client privilege was not available.

privilege applies only to confidential communications between attorney and client and does not encompass communications by a third party unless he is acting merely as an agent in transmitting the communication from the client to the attorney.[18] See VIII Wigmore, *Evidence,* § 2317, p. 619 (McNaughton rev., 1961); *Bouschor* v. *United States,* 316 F. 2d 451, 456–458 (C.A. 8), and cases cited therein; *United States* v. *Goldfarb,* 328 F. 2d 280 (C.A. 6), certiorari denied, 377 U.S. 976; *United States* v. *Threlkeld,* 241 F. Supp. 324 (W.D. Tenn.).

The accountant's workpapers in these cases do not constitute confidential communications between the taxpayer and his lawyer. They contain unprivileged information (see *Couch* v. *United States, supra,* 409 U.S. at 335) disclosed by the taxpayer to the accountant long before the commencement of the attorney-client relationship. Cf. *United States* v. *Kovel,* 296 F. 2d 918 (C.A. 2). There is accordingly no basis for the invocation of the attorney-client privilege with respect to the accountant's workpapers. Evidentiary materials not otherwise privileged cannot be made unavailable to proper investigatory or judicial process merely by being turned over to the custody of a lawyer.

3. Despite the conceded unavailability of the attorney-client privilege, the court of appeals in No.

[18] In No. 74–18, the court of appeals also stated that "[p]apers otherwise not endowed with Fifth Amendment protection cannot be transmuted into a privileged status merely because of the act of delivery to a lawyer" (Pet. App. B A23). The court noted that the petitioners in that case also disclaimed reliance on the attorney-client privilege (Pet. App. B A22).

74–611 concluded (Pet. App. B 17A–18A), and petitioners in No. 74–18 contend (Br. 25–27), that the existence of an "attorney-client relationship" gave the taxpayer a legitimate expectation of privacy with regard to the summoned workpapers. Observing that an attorney is forbidden by the American Bar Association's Disciplinary Rules of the Code of Professional Responsibility from knowingly disclosing his client's secrets or confidences, the Fifth Circuit stated that the attorney's possession of the summoned workpapers "helps to give substance to a Fifth Amendment privilege contention" (Pet. App. B 17A–18A).

There is, we submit, no basis for such an open-ended and novel expansion of the privilege against self-incrimination under the guise of the attorney-client relationship. Contrary to the court of appeals' suggestion, the disciplinary rules of the American Bar Association cannot create a privilege if none otherwise exists to bar required production of records. Indeed, Rule 4–2 of the same Code of Professional Responsibility to which the court below referred, and upon which petitioners in No. 74–18 rely (Br. 27), provides that "[t]he obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing information * * * when required by law." See also *In re Grand Jury Appearance of Alvin S. Michaelson, Esq.*, C.A. 9, No. 74–3409, decided January 22, 1975, slip op. 16–17, certiorari denied, No. 74–1011 (May 19, 1975).

The fact that a person has retained counsel and transmitted potentially incriminating but unprivileged material to him does not immunize that material

from compulsory disclosure. If the rule were otherwise, the attorney-client privilege would largely be subsumed in a grossly expanded Fifth Amendment privilege encompassing the entire gamut of information and evidentiary material received by an attorney concerning his client. Attorneys would then become repositories of, and sanctuaries for, unprivileged material incriminatory to their clients—a result justified by neither the Fifth Amendment nor the attorney-client privilege."

II. EVEN IF THE CLIENT'S PRIVILEGE AGAINST SELF-INCRIMINATION WERE AVAILABLE AS A BAR TO PRODUCTION OF HIS ACCOUNTANT'S WORKPAPERS, THE CLAIMANT'S ATTORNEY COULD NOT INVOKE THE PRIVILEGE ON BEHALF OF THE CLIENT

After concluding that the accountant's workpapers were protected by the taxpayer's privilege against self-incrimination, the Fifth Circuit in No. 74–611 further held that the claimant's attorney, respondent Kasmir, could properly invoke his client's privilege. In so holding, the court acknowledged that "there is no unanimity among the courts in their answers to the question posed * * *." However, it ruled that "the realities of tax litigation require that the attorney be allowed to press his client's claim where the client

[19] Although petitioners in No. 74–18 invoke (Br. 23) their Sixth Amendment right to counsel as a basis for refusal to comply with the summons, that right has never been construed to bar disclosure of all evidence in the hands of an attorney. Moreover, since petitioners have no Fifth Amendment privilege in their accountant's workpapers, they are not, as they urge (Br. 24), being put to a choice between their privilege against self-incrimination and their right to counsel.

could successfully do so" (Pet. App. B 19A). Thus, the fact that the claimant, Dr. Mason, never appeared before the district court to invoke his privilege against self-incrimination was held not to render the claim unavailable.

The question whether the claimant's attorney can properly invoke his client's Fifth Amendment privilege need be reached in No. 74–611 only if the Court concludes, contrary to our contention, that the privilege is available with respect to the accountant's workpapers.[20] However, assuming *arguendo* that the privilege is available under these circumstances, we do not believe that the "realities" of tax litigation or any other type of litigation support the conclusion of the court of appeals that the claimant's attorney may invoke the privilege on behalf of his client. Indeed, the decisions of this Court establish precisely the contrary proposition, that the privilege against self-incrimination—an "intimate and personal one" adhering to the person of the claimant (*Couch* v. *United States, supra,* 409 U.S. at 327)—can only be asserted by the claimant. For example, in *Hale* v. *Henkel,* 201 U.S. 43, 69–70, the Court observed that the Fifth Amendment privilege "is purely a personal privilege of the witness" and "was never intended to permit [the witness] to plead the fact that some third person might be incriminated by his testimony, *even though he were the agent of such person*" (emphasis added). See also *McAlister* v. *Henkel,* 201 U.S. 90, 91; *United*

[20] This question is not presented in No. 74–18 because the taxpayers there intervened in the district court and asserted the privilege for themselves.

States v. *White, supra,* 322 U.S. at 704; *Rogers* v. *United States,* 340 U.S. 367, 371.[21]

In our view, there are important practical reasons why an attorney should not be permitted to invoke his client's privilege against self-incrimination—at least where, as here, the client is available to intervene and assert the claim for himself. The statement of the court of appeals (Pet. App. B 20A) that there is "no reason to require" the personal appearance of the claimant before the court, overlooks the fact that the privilege against self-incrimination is not an automatic bar to the securing of evidence but, like other privileges, may freely be waived by the person entitled to claim it. Moreover, a claim of the privilege need not be accepted on its face. In appropriate circumstances, the court may inquire into the basis for the claim. See *Hoffman* v. *United States,* 341 U.S. 479,

[21] On the authority of the Court's statement in *Hale* v. *Henkel, supra,* there have been a number of decisions of the lower federal courts holding that an attorney cannot invoke his client's Fifth Amendment privilege. See, *e.g., Ziegler* v. *United States,* 174 F. 2d 439, 447 (C.A. 9), certiorari denied, 338 U.S. 822; *Bouschor* v. *United States,* 316 F. 2d 451, 458–459 (C.A. 8); *United States* v. *Goldfarb,* 328 F. 2d 280, 282 (C.A. 6), certiorari denied, 377 U.S. 976. Accord, *In re Fahey,* 300 F. 2d 383, 385 (C.A. 6); *United States* v. *Boccuto,* 175 F. Supp. 886, 888 (D. N.J.), appeal dismissed, 274 F. 2d 860 (C.A. 3). Contra, *United States* v. *Judson,* 322 F. 2d 460 (C.A. 9); *Colton* v. *United States,* 306 F. 2d 633, 639 (C.A. 2) (dictum), certiorari denied, 371 U.S. 951; *Application of House,* 144 F. Supp. 95 (N.D. Cal.). See also VIII Wigmore, *Evidence,* § 2270, p. 416 (McNaughton rev., 1961) ("The rule is that the privilege must be claimed personally; however, the courts, especially when the witness is a party or when the situation otherwise demands, frequently permit counsel for the witness to call the witness' attention to the privilege or to plead it in his behalf.").

486. Indeed, with respect to documentary evidence, there may be need for a factual determination whether the documents sought are the private papers of the claimant.

For all of these reasons, the claimant should be required to come forward and assert the claim of privilege himself, and to answer pertinent questions of the court and counsel concerning the factual basis of the claim. Accordingly, since there was no reason to believe that the claimant in No. 74–611 was not readily available to appear before the district court and assert the claim for himself, his attorney should not have been permitted to claim his client's privilege against self-incrimination.

CONCLUSION

For the reasons stated, the judgment of the Fifth Circuit in No. 74–611 should be reversed and the judgment of the Third Circuit in No. 74–18 should be affirmed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
SCOTT P. CRAMPTON,
Assistant Attorney General.
LAWRENCE G. WALLACE,
Deputy Solicitor General.
STUART A. SMITH,
Assistant to the Solicitor General.
ROBERT E. LINDSAY,
GARY R. ALLEN,
Attorneys.

JUNE 1975.

U.S. GOVERNMENT PRINTING OFFICE: 1975

Supreme Court, U. S.
FILED
AUG 4 1975
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

Nos. 74-18 and 74-611

SOLOMON FISHER, *et al.*,
Petitioners,

vs.

UNITED STATES, *et al.*,
Respondents.

UNITED STATES, *et al.*,
Petitioners,

vs.

C. D. KASMIR, *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE THIRD AND FIFTH CIRCUITS

BRIEF OF AMERICAN BAR ASSOCIATION AS AMICUS CURIAE

RICHARD H. APPERT
14 Wall Street
New York, N. Y. 10005

LOUIS BENDER
225 Broadway
New York, N. Y. 10007

MICHAEL I. SALTZMAN
280 Park Avenue
New York, N. Y. 10017
Attorneys for American Bar Association as Amicus Curiae

JAMES D. FELLERS
2700 First National Center
Oklahoma City, Oklahoma 73102
President, American Bar Association
Of Counsel

TABLE OF CONTENTS

PAGE

Interest of Amicus Curiae 1

Questions Presented 2

Argument:

The Constitutional Privilege Against Self-Incrimination is Neither Diminished Nor Forfeited When a Taxpayer-Client Transfers Books and Papers to his Attorney for the Purpose of Obtaining Legal Assistance 2

a. When Taxpayers Transfer Records to Their Attorneys, the Records Remain in the Constructive Possession of the Taxpayers for Fifth Amendment Privilege Purposes 7

b. An Attorney to Whom Accountants' Papers Have Been Transferred by a Taxpayer for the Purpose of Obtaining Legal Advice Has Standing to Plead the Fifth Amendment Privilege in his Client's Behalf 11

Conclusion 16

TABLE OF CITATIONS

Cases:

Bouschor v. United States, 316 F.2d 451 (8th Cir. 1963) 6, 11, 13

Brody v. United States, 243 F.2d 378 (1st Cir. 1957), *cert. den.,* 354 U.S. 923 6

Chirac, et al. v. Reinicker, 11 Wheat. (24 U.S.) 280 (1826) 4, 12

Colton v. United States, 306 F.2d 633 (2d Cir. 1962), *cert. den.,* 371 U.S. 951 11

Connecticut Mutual Life Insurance Company v. Schaefer, 94 U.S. 457 (1877) 4, 12

Couch v. United States, 409 U.S. 322 (1973) 3, 6, 7, 10

Fisher v. United States, 500 F.2d 683 (3d Cir. 1974) 10

Grant v. United States, 227 U.S. 74 (1913), *affirming* 198 Fed. 708 (S.D.N.Y. 1912) 11, 14

	PAGE
Hale v. Henkel, 201 U.S. 43 (1906)	13
Application of House, 144 F. Supp. 95 (N.D. Cal. 1956)	12
Johnson v. Zerbst, 304 U.S. 458 (1938)	3
Powell v. Alabama, 287 U.S. 45 (1932)	3, 4
United States v. Bellis, 417 U.S. 85, 40 L.Ed.2d 678 (1974)	13
United States v. Cohen, 388 F.2d 464 (9th Cir. 1967)	15
United States v. Judson, 322 F.2d 460 (9th Cir. 1963)	6, 11, 12, 15
United States v. Kasmir, 499 F.2d 444 (5th Cir. 1974)	8
United States v. Louisville & Nashville R.R. Company, 236 U.S. 318 (1915)	4, 12
United States v. White, 322 U.S. 694 (1944)	13, 14, 15
Wilson v. United States, 221 U.S. 361 (1911)	14

Treatises and Other Sources:

American Bar Association, Code of Professional Responsibility, Canon 4	4, 12
American Bar Association, Code of Professional Responsibility, Canon 7	3, 8, 12
American Bar Association, Project on Standards for Criminal Justice, Standards Relating to the Prosecution, Function and the Defense Function (Tentative Draft, 1970)	5
Internal Revenue Service News Releases:	
IR 897, Oct. 3, 1967	5
IR 949, Nov. 26, 1968	5
Mechem on Agency, 2d ed., Vol. 2, § 2297	6
VIII Wigmore, Evidence (McNaughton rev., 1961):	
§ 2290	4
§ 2307	11

In The

Supreme Court of the United States

Nos. 74-18 and 74-611

SOLOMON FISHER, *et al.*,
Petitioners,

vs.

UNITED STATES, *et al.*,
Respondents.

UNITED STATES, *et al.*,
Petitioners,

vs.

C. D. KASMIR, *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE THIRD AND FIFTH CIRCUITS

BRIEF OF AMERICAN BAR ASSOCIATION AS AMICUS CURIAE

Interest of Amicus Curiae

The American Bar Association is an association of attorneys who render legal assistance to individuals as well as other clients. The cases here involved will directly affect the relationship between attorneys and their individual clients because the standing of an attorney to raise the constitutional privilege against self-incrimination on behalf of his client and the forfeiture of a client's Fifth Amendment privilege on the transfer of books and papers in the

client's possession to an attorney for the purpose of obtaining legal advice, are in issue. Amicus has a direct interest in any decision which would deprive an individual of his Fifth Amendment privilege for having consulted his attorney.

Questions Presented

1. Does a taxpayer-client divest himself of possession for the purposes of the Fifth Amendment privilege when to obtain legal advice he transfers books and papers to his attorney, or is the attorney's possession the constructive possession of the taxpayer-client entitling him to the protection of the privilege?

2. If a taxpayer under investigation by the Internal Revenue Service consults an attorney and for the purpose of obtaining legal assistance delivers to him books and papers which the taxpayer-client had in his possession, does the attorney have the same standing to raise the Fifth Amendment privilege on behalf of his client as the client would have if the books and papers had remained in the client-taxpayer's actual possession?

ARGUMENT

The Constitutional Privilege Against Self-Incrimination is Neither Diminished Nor Forfeited when a Taxpayer-Client Transfers Books and Papers to his Attorney for the Purpose of Obtaining Legal Assistance.

In both cases at bar, taxpayers consulted attorneys before any process in the form of an administrative summons had been served and in *Kasmir* after an Internal Revenue Service criminal investigation had begun. For the purpose of obtaining legal advice, taxpayers transferred to their attorneys, Petitioner Fisher and Respondent Kasmir, papers[1] which the taxpayers had in their possession after receiving them from their accountants. The Government claims that taxpayers who sought professional legal assistance forfeited their Fifth Amendment privilege when they left the papers with their attorneys for the purpose of obtaining legal advice. The Fifth Circuit properly rejected this argument in *Kasmir* and held that an attorney could claim the Fifth Amendment privilege on his client's behalf with respect to the papers and other records the client transferred to the attorney for the purpose of obtaining legal assistance. The Third Circuit did not reach this issue in *Fisher*, upholding enforcement for lack of sufficient possession under the *Couch* rule[2] to permit privileged status to attach to the papers transferred to the attorney.

That the confidentiality of the relationship between an attorney and his client is vital to the functioning of the American system of law is too time-honored to belabor. The attorney serves a client as both adviser and advocate, duty-bound under the rules of his profession "to represent a client zealously within the bounds of law" and "to secure and protect [for the client] available legal rights and benefits." American Bar Association, Code of Professional Responsibility, Canon 7, EC 7-1. Society's laws have long since become so complex that the average person requires from time to time the advice and the assistance of his attorney. "Even the intelligent and educated layman has small and sometimes no skill in the science of the law." *Powell* v. *Alabama*, 287 U.S. 45 (1932); *Johnson* v. *Zerbst*, 304

1. In *Fisher*, but not in *Kasmir*, there is a dispute between the parties as to whether the papers prepared by the accountant were "accountant's workpapers." Since we are not taking a position in this dispute, we will refer to the items simply as "papers."

2. *Couch* v. *United States*, 409 U.S. 322 (1973).

U.S. 458 (1938). Also because of the complexity of law, the attorney-advocate is recognized in American courts as his client's spokesman. In fact, "If in any case, civil or criminal, a state or federal court were to arbitrarily refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and therefore of due process in the constitutional sense . . ." *Powell* v. *Alabama, supra.*

To provide meaningful professional legal assistance, however, the attorney must be free to bring to bear on his client's problems the skills, experience and judgment he possesses. Frequently, he can do this only if he knows all that his client knows concerning the facts. Otherwise, he may give his advice without important information, neglect a valuable defense, or be unaware of evidence that might be damaging to his client's legal position. Since the client is not competent to evaluate the relevance or significance of facts, the attorney must, therefore, insist on full and candid disclosure. It is to encourage this full and candid disclosure that the law recognizes and the attorneys rules of conduct require that an attorney must preserve confidences and secrets disclosed by the client for the purpose of obtaining professional aid or advice. See American Bar Association, Code of Professional Responsibility, Canon 4. See also *Chirac, et al.* v. *Reinicker,* 11 Wheat (24 U.S.) 280, 291 (1826); *Connecticut Mutual Life Insurance Company* v. *Schaefer,* 94 U.S. 457, 459; *United States* v. *Louisville & Nashville R.R. Company,* 236 U.S. 318, 336 (1915); VIII Wigmore, Evidence (McNaughton rev., 1961) § 2290.

Furthermore, the attorney must be able to perform his function free from interference. This freedom from interference is necessary not only if the attorney is to be able

to obtain a full and complete disclosure of all the facts from his client, but also if he is to be able to handle the matter intelligently and competently from the administrative stage to a trial, if necessary. In short, without complete disclosure of all facts pertinent to the matter on which he is consulted, the attorney will be unable to fulfill the role of the truly professional adviser and advocate. See American Bar Association, Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function and the Defense Function (Tentative Draft, 1970) pp. 147 and 201.

In a criminal tax investigation, the suspect's need for professional legal assistance becomes vital.[3] If law in general is complex, the tax law is exceedingly so, and especially when, as in the cases under consideration, it is weighted with the implication of potential criminal prosecution and loss of liberty. Moreover, in a tax matter, the client's communications to his attorney for the purpose of obtaining legal advice are likely to be—indeed necessarily must be—in the form of papers, books and records. The client cannot make full and free disclosure to his attorney of all that is relevant if the attorney cannot have ready access to his client's books and records, nor can the attorney otherwise render meaningful and effective legal assistance on the matter as to which he is being consulted. More fundamentally, a rule that a client's constitutional privilege is diminished or forfeited as a consequence of his having consulted, and revealed privileged information to, his attorney would utterly destroy the attorney-client relationship

3. The Internal Revenue Service itself recognizes the importance of counsel during a criminal tax investigation. It requires its special (criminal) agents to advise a taxpayer under investigation that he has a right to consult an attorney. News Release, IR 949, Nov. 26, 1968; News Release, IR 897, Oct. 3, 1967. In *Kasmir* such a warning had been given.

and prevent the usefulness and benefits to be derived from professional assistance. See Mechem on Agency, 2d ed., Vol. 2, sec. 2297.

In the cases under consideration, *Amicus* does not take a position on whether a taxpayer is entitled to claim the Fifth Amendment privilege with respect to papers prepared by an accountant under the circumstances involved here. We take it as established, furthermore, that no person may *enlarge* his constitutional privilege by the mere expedient of transferring records to his attorney. *Couch* v. *United States,* 409 U.S. 322 (1973). Thus when the client himself would be unable to raise the Fifth Amendment privilege with respect to particular records, the attorney having possession of those records is bound to produce them. But if the client himself would be privileged from producing the records, had the records remained in the client's hands, the attorney having possession of the records should not be required to produce them. *United States* v. *Judson,* 322 F.2d 460 (9th Cir. 1963), *cert. den.* 371 U.S. 951 (1963); *Brody* v. *United States,* 243 F.2d 378 (1st Cir. 1957), *cert. den.* 354 U.S. 923 (1957) but cf. *Bouschor* v. *United States,* 316 F.2d 451 (8th Cir. 1963). However, we do not believe that the attorney-client relationship can long survive a rule that would diminish an individual's Fifth Amendment privilege for having consulted an attorney and for having delivered papers and records to the attorney to obtain legal assistance.

In view of the foregoing, *Amicus* supports the result reached by the Fifth Circuit in *Kasmir* that a taxpayer does not forfeit his Fifth Amendment privilege when he transfers accounting workpapers to his attorney for the purpose of obtaining legal advice. The Third Circuit in *Fisher* did not squarely decide that a taxpayer loses his Fifth Amendment privilege solely by reason of the transfer of records

to his attorney; however, *Amicus* does oppose any implication in the decision that Fifth Amendment rights were lost by reason of the transfer to the attorney which would have existed had possession remained in the client.

a. When taxpayers transfer records to their attorneys, the records remain in the constructive possession of the taxpayers for Fifth Amendment privilege purposes

In the context of the *Couch* case, what we urge means that a taxpayer-client retains constructive possession of any records he transfers to his attorney for the purpose of obtaining legal assistance. This Court said in *Couch,* 409 U.S. at 333:

> "We do indeed believe that actual possession of documents bears the most significant relationship to Fifth Amendment protections against governmental compulsions upon the individual accused of crime. Yet situations may well arise where constructive possession is so clear or the relinquishment of possession is so temporary and insignificant as to leave the personal compulsions upon the accused substantially intact."

After the commencement of a criminal investigation of their tax returns but prior to the service of any summons, the taxpayers involved in these cases obtained actual possession of papers prepared by their accountants when their accountants voluntarily transferred the papers to them. Later,[4] the taxpapers transferred the same records to their attorneys for the purpose of obtaining legal assistance.

4. In *Fisher,* the taxpapers obtained the papers on August 4 or 5, 1971, and delivered them to their attorney, Fisher, on August 17, 1971. In *Kasmir,* the taxpapers obtained the records on January 4, 1973, and delivered them to their attorney, Kasmir, the same day.

When the taxpayers obtained actual possession of the papers from their accountants, however, they did not divest themselves of that possession by transferring the papers to their attorneys. A taxpayer's transfer of his records to his attorney must be one of those "clear" situations anticipated in *Couch* where constructive possession remains in the taxpayer-client if the taxpayer-client is not to lose his privilege for having consulted an attorney and the attorney-client relationship is to survive.

A taxpayer retains constructive possession of the records he transfers to his attorney because the taxpayer-client retains dominion and control over any records transferred to the attorney. For this purpose the attorney is the client's agent, and the possession of the agent is the constructive possession of his principal. The client's decisions affecting the records turned over to him are binding on the attorney. Obviously if the client wants his papers back, the attorney must return them. The American Bar Association Code of Professional Responsibility provides (EC 7-7):

> "In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make a decision is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer."

Moreover, when the taxpayers transferred the papers to their attorneys they had a right to expect that this information would be kept confidential because an attorney is bound to preserve the confidences and secrets of his client. As the Fifth Circuit said in *Kasmir,* 499 F.2d at 453:

> ". . . [W]here the taxpayer transfers potentially incriminating materials which he physically possesses to his attorney pursuant to an attorney-client relationship, the taxpayer's legitimate expectation of privacy with regard to the use of the materials should be quite different from his legitimate expectations as to its use in the hands of an independent accountant preparing tax returns. While the accountant has a legal duty to disclose, the attorney has a strict, ethical obligation to prevent disclosure. This ethical obligation is broader than and independent of the attorney-client privilege,[6] which is admittedly not available here. The Disciplinary Rules of the Code of Professional Responsibility prepared by the American Bar Association absolutely forbid an attorney from knowingly revealing either a 'confidence' or a 'secret' of his client. A 'confidence' refers to information protected by the attorney-client privilege while a 'secret' refers to any other information 'gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.' ABA Code of Professional Responsibility, DR 4-101(A), (B)(1). Of course, the taxpayer cannot assert the attorney-client relationship, as distinguished from the attorney-client privilege, as a basis for denying enforcement of the summons. But even where there is no attorney-client privilege in certain material, as here, the taxpayer client may still have a legitimate expectation of privacy with regard to that material because of the attorney-client relationship, an expectation of privacy which helps to give substance to a Fifth Amendment privilege contention.

6. The ABA Code of Professional Responsibility, Ethical Consideration 4-4 provides in part:

> 'The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge.' "

Thus, as Justice Marshall said in his dissent in *Couch* (409 U.S. at 350): "A transfer to a lawyer is protected, not simply because there is a recognized attorney-client privilege, but also because the ordinary expectation is that the lawyer will not further publicize what he has been given."

The instant cases are distinguishable from the situation in *Couch,* therefore. In *Couch,* the accountant was bound to disclose on tax returns and in audit the matters contained in records the taxpayer had left in his possession not only for a long period of time but even until after he had been served with a summons. In the instant cases, the records were delivered to the attorneys prior to service of summons and the attorneys to whom the records were transferred were bound *not* to disclose the matters contained in the records and were not retained to prepare tax returns but to assist the taxpayers by rendering legal advice or preparing their defense.

Unlike the Fifth Circuit in *Kasmir,* the Third Circuit adopted an "aging" rule in *Fisher* that unless the records are in the possession of the taxpayer for an extended period of actual possession, they do not have (500 F.2d at 692):

> "the legal capacity to generate a subsequent right of constructive possession of sufficient intensity to elevate those records into the required category of . . . 'private books and papers'. We are unwilling to attribute a Fifth Amendment protection to the accountant's work product based on such a limited possession by his client."

Amicus submits that, since possession by an attorney is one of those "clear" situations of a taxpayer's constructive possession, the taxpayer cannot limit his possession by transferring records to his attorney. The fact that he had the records only a short time before the transfer is irrelevant. Moreover, we have been able to find neither authority nor logical support for the proposition that a waiting period is a prerequisite to the exercise of the constitutional privilege.

b. An attorney to whom accountants' papers have been transferred by a taxpayer for the purpose of obtaining legal advice has standing to plead the Fifth Amendment privilege in his client's behalf

The same considerations which establish the importance of the attorney-client relationship and the client's constructive possession of books and records he transfers to his attorney are the basis also for the rule that the attorney has standing to raise his client's Fifth Amendment privilege claim with respect to twice transferred records. The Fifth Circuit in *Kasmir* properly followed the rule, enunciated by a majority of the courts of appeal which have considered the issue, that although the privilege is a personal one, an attorney may claim the Fifth Amendment privilege on his client's behalf. *United States* v. *Judson,* 322 F.2d 460 (9th Cir. 1963), *supra; Colton* v. *United States,* 306 F.2d 633 (2d Cir. 1962); see also, *Grant* v. *United States,* 227 U.S. 74 (1913), *affirming* 198 Fed. 708 (S.D.N.Y. 1912); VIII Wigmore, Evidence (McNaughton rev., 1961), sec. 2307; but see *Bouschor* v. *United States,* 316 F.2d 451 (8th Cir. 1963), *supra.*

It is manifest that "the very nature of the tax law requires taxpayers to rely upon attorneys, and requires attorneys to rely, in turn, upon documentary indicia of their client's financial affairs." *United States* v. *Judson, supra,* 322 F.2d at 468. A rule which ignores these "realities" and requires a taxpaper to be present whenever and wherever the attorney requires the records for the purpose of rendering legal assistance and to reclaim these records at the end of each

session with his attorney in order to be able to claim the privilege, would impose a heavy burden on the functioning of the attorney-client relationship. This result would be undesirable as a matter of policy, and, to the extent that it imposes on the taxpayer "the choice of attending hearings or investigations, sometimes carried on over considerable periods of time, or waiving his privilege against self-incrimination," would establish a constitutionally intolerable penalty to the exercise of the privilege. *United States* v. *Judson, supra,* 322 F.2d at 468; *Application of House,* 144 F.Supp. 95, 100 (N.D.Cal. 1956).

Confidentiality of communications between client and attorney and the resulting protection against disclosure by the attorney have a long and illustrious history of judicial acceptance, as noted in *Chirac, et al.* v. *Reinicker,* 11 Wheat. (24 U.S.) 280, 291 (1826), *supra; Connecticut Mutual Life Insurance Company* v. *Schaefer,* 94 U.S. 457, 459 (1877), *supra; United States* v. *Louisville & Nashville R. R. Company,* 236 U.S. 318, 336 (1915), *supra.* It should be noted furthermore that reasons of policy which require an attorney to claim the attorney-client privilege in behalf of his client (American Bar Association, Code of Professional Responsibility, Canon 4, EC (4-4) similarly would seem to require the attorney to claim any Fifth Amendment privilege of his client with respect to records transferred to him in confidence and for legal advice. If the professional obligation of the attorney to represent a client zealously within the bounds of the law presumptively requires the attorney to claim the evidentiary privilege on his client's behalf, surely this professional obligation requires the attorney to claim the Fifth Amendment privilege on his client's behalf unless there is evidence to the contrary. American Bar Association Code of Professional Responsibility, Canon 7, EC 7-1. *See United States* v. *Judson, supra,* 322 F.2d at 468.

Despite these considerations of reason and policy, the Eighth Circuit in *Bouschor* v. *United States, supra,* has held that an attorney does not have the right to assert on behalf of his client the Fifth Amendment's privilege against self-incrimination. In *Bouschor* a Revenue Agent had examined in the course of a civil audit the workpapers taxpayer's accountants had in their files. Subsequently, after an attorney was retained and the case had been transferred to a Special Agent for purposes of a criminal investigation, the workpapers were transferred to the attorney at the taxpayer's direction made through his attorney. Under these circumstances, the Eighth Circuit considered the accountant's workpapers to be in the attorney's possession not in a "personal" but a "representative" capacity, and held, therefore, that the attorney did not have standing to claim the Fifth Amendment privilege which must be claimed in person.

The "personal-representative" dichotomy from which the Court reasoned does not apply in a situation where an attorney holds records for a client. This dichotomy has developed from cases where criminal activity of an agent of a collective group is suspected. In this context, this Court has held that, "The constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals." *United States* v. *White,* 322 U.S. 694, 698 (1944). Thus, the privilege cannot be utilized by such organizations as corporations (*Hale* v. *Henkel,* 201 U.S. 43 (1906); unincorporated associations (for example, a union) *United States* v. *White, supra*); and more recently, a partnership (*United States* v. *Bellis,* 417 U.S. 85, 40 L.Ed.2d 678 (1974)). Moreover, individuals, when acting as "representatives" of these corporations or impersonal collective groups, "cannot be said to be exercising their personal rights and duties nor to be entitled to

their purely personal privileges." *United States* v. *White, supra,* 322 U.S. at 699. Consequently, the official records and documents "of the organization" cannot be the subject of the personal privilege against self-incrimination even if these records and documents incriminate their custodian personally. *Wilson* v. *United States,* 221 U.S. 361 (1911) (custodian of corporate records); *Grant* v. *United States, supra* (custodian of dissolved corporation's records); *United States* v. *White, supra* (custodian of union's records).

The reason for this rule was stated in *United States* v. *White* as follows (322 U.S. at 700):

> "The reason underlying the restriction of this constitutional privilege to natural individuals acting in their own private capacity is clear. The scope and nature of the economic activities of incorporated and unincorporated organizations and their representatives demand that the constitutional power of the federal and state governments to regulate those activities be correspondingly effective. The greater portion of evidence of wrongdoing by an organization or its representatives is usually to be found in the official records and documents of that organization. Were the cloak of the privilege to be thrown around these impersonal records and documents, effective enforcement of many federal and state laws would be impossible. The framers of the constitutional guarantee against compulsory self-disclosure, who were interested primarily in protecting individual civil liberties, cannot be said to have intended the privilege to be available to protect economic or other interests of such organizations so as to nullify appropriate governmental regulations."

This description of the reason for the developed distinction between possession in a "representative" as opposed to a "personal" capacity makes it obvious that the distinction

does not apply to an attorney who holds records of his client. *United States* v. *Cohen,* 388 F.2d 464, 467 (9th Cir. 1967). The accountant's papers involved here are not "independent" in the sense that term is used in *White. United States* v. *Judson, supra,* 322 F.2d at 466. On the contrary, these papers were summaries and analyses which were entirely dependent upon the existence of the financial records of the individual taxpaper (not a collective group) on behalf of whom the privilege was claimed. Nor were the attorneys here "representatives" in the *White* sense because the "rights, duties and privileges" which they assumed as agents for their taxpayer-clients and by which they are bound, *include* the privilege against self-incrimination. See *United States* v. *White, supra,* 322 U.S. at 699. Moreover, the *Bouschor* court totally ignored the special attorney-client relationship described above. By contrast, the Ninth Circuit in *Judson* said (322 F.2d at 467):

> "The government states that the evil which the Fifth Amendment sought to prevent is not present when the prosecution seeks evidence of A's guilt from B. But this argument ignores the realities of the relationship existing where B is A's attorney. An attorney is his client's advocate. His function is to raise all the just and meritorious defense his client has. No other 'third party', nor 'agent', nor 'representative' stands in such a unique relationship between the accused and the judicial process as does his attorney. He is the only person besides the client himself who is permitted to prepare and conduct the defense of the matter under investigation. The attorney and his client are so identical with respect to the function of the evidence and to the proceedings which call for its production that any distinction is mere sophistry."

Accordingly, if the attorney-client relationship is to be preserved, an attorney must have standing to raise his

client's Fifth Amendment privilege with respect to books and papers the client has transferred to the attorney for the purpose of obtaining legal assistance.

Conclusion

In view of the foregoing, *Amicus* American Bar Association submits that this Court in deciding the two cases here involved should hold that whatever Fifth Amendment privilege a client has with respect to books and records in his possession is not lost by delivering them to his attorney for the purpose of obtaining legal assistance and that in such circumstances the attorney has standing to raise whatever Fifth Amendment privileges would be available if the books and records were still in the possession of the client.

Respectfully submitted,

RICHARD H. APPERT
14 Wall Street
New York, N. Y. 10005

LOUIS BENDER
225 Broadway
New York, N. Y. 10007

MICHAEL I. SALTZMAN
280 Park Avenue
New York, N. Y. 10017
Attorneys for American Bar Association as Amicus Curiae

JAMES D. FELLERS
2700 First National Center
Oklahoma City, Oklahoma 73102
President, American Bar Association
Of Counsel

July 30, 1975

see

74-611